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BY

Sir ARNOLD McNAIR, C.B.E., K.C., F.B.A., LL.D.

AND

Professor F. H. LAWSON, D.C.L.

ASSISTED BY

Professor H. C. GUTTERIDGE, K.C., LL.D.

"A generous and elevated mind is distinguished by nothing more certainly than an eminent degree of curiosity; nor is that curiosity ever more agreeably or usefully employed that in examining the laws and customs of foreign nations"

SAMUEL JOHNSON.

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THE COLONIAL LEGAL SERVICE AND THE ADMINISTRATION OF JUSTICE IN COLONIAL DEPENDENCIES*

[*By* The Rt. Hon. Sir Sidney Abrahams.]

The Colonial Legal Service is mainly responsible for the administration of justice throughout the non-self-governing territories within the Empire. A career in the Service may begin about 30, and may end at the retiring age for a judge of 62, and since promotion is within the Service, a career may lead to a considerable experience of the world, its peoples, and its laws. The administration of justice by a service does not exist in this country, and from the fact that it is a service it has defects. Nevertheless, taking it for all in all it works well.

The most important members of the Service are the Judges, Magistrates and Law Officers. There are other posts which require the services of trained lawyers and which are filled by members of the Service, such as Court Registrars and Clerks, Registrars of Companies, Official Receivers in Bankruptcy, etc. It is, however, with the first three categories I propose to deal, concerned as they are directly with the administration of justice.

As the maintenance of law and order is the primary function of government, it follows that every dependency must have Courts to try, and if necessary to punish breakers of the law, and to adjudicate upon disputes. In brief, there must be criminal and civil courts. No matter how small the dependency, it always possesses a Court of unlimited criminal and civil jurisdiction. In a Colony this is the Supreme Court, in a Protectorate or Trust Territory the High Court. Besides this Court there is at least one Magistrates' Court to try lesser offences, to commit for trial to the superior Court, and often to try minor civil suits. In Ceylon and Malaya, there exist Courts of intermediate jurisdiction called District Courts with District judges. In Cyprus there is something similar. The presiding judge of the highest Court is generally styled Chief Justice; Chief Judge in Mauritius for some historical reason. In Aden and in Gambia there is only one judge and he is styled the Judge of the Supreme Court.

Now in the 35 Dependencies served by the Colonial Legal Service there are substantial divergences in area, populousness, distribution of population, revenue and social and political developments. I will give two instances at opposite ends of the scale. The Seychelles, a group of islands in the Indian Ocean with a total area of 156 square miles, a population of about 30,000 and a revenue of about £100,000. On the other hand there is Nigeria with an area of 372,000 square miles (half as large again as Germany), a population of about 22,000,000 and a revenue of about £11,000,000. In the Seychelles the needs of justice are served by the Chief Justice, a Magistrate, an Attorney-General and Assistant Attorney-General. In Nigeria there is a Chief Justice, 12 puisne judges, 20 magistrates, an Attorney-General, Solicitor-General and 14 Crown Counsel. One thing is however unvarying and that is, that whatever may be the size or importance of the dependency or the number of Judges, the power and jurisdiction of the Judges in civil and criminal matters is the same. Indeed, it is as large and as effective as that of the High Court in England.

Now if there is more than one Judge the Chief Justice is judicially merely primus inter pares; administratively he is primus inter omnes. He arranges the cause list, fixes the circuits and assigns the Judges to judicial centres where they exist. He is the spokesman for the Judiciary in transmitting their views, opinions, requests and, as it may sometimes happen, their remonstrances and other representations to the Governor or the Secretary of State. He has the rather invidious task of reporting annually upon the work of and qualities of the Judiciary and Magistracy, this being one of the means of assessing individual fitness for promotion or sometimes for retention in the Service. The Judges are usually promoted from Magistracies or Crown-Counselships, and Chief Justice-

* A lecture delivered at the London School of Economics, March 16, 1948.

ships are the rewards for which the ablest Judges compete with Attorneys-General. Sometimes members of the local bar are appointed direct to Judgeships. This has been so for many years in Ceylon; it happens in the West Indies, and within the last five years three Africans on the Gold Coast and one in Nigeria have been so elevated—a gratifying advance in development and a tribute to the local bar.

The Supreme or High Court also hears appeals from the lower Courts and in some dependencies can also review and alter their decisions. In certain dependencies, also, there is a local Court of Appeal from the Judges' own decisions. The Privy Council is the ultimate Court of determination in the Empire, and its voice reaches from Whitehall across to Fiji to quash a conviction, or to restore property in Lagos, or to declare the validity of a will in Singapore, indeed to correct errors of law or fact or remedy any injustice committed by His Majesty's Courts anywhere. However, to avoid delay and undue expense it is desirable that appealable matters should be disposed of near at hand. Moreover, the Privy Council is not an ordinary Court of Criminal Appeal and will not interfere unless a substantial and grave injustice has obviously been done. Hence the desirability of a local Court of Criminal Appeal. In some dependencies there are enough judges for appellate needs—Ceylon, Malaya, Jamaica and Cyprus for instance. Elsewhere adjacent dependencies are grouped for the purpose: the judges of Kenya, Tanganyika, Uganda and Zanzibar constitute the East African Court of Appeal for these territories, and Aden, until now subject to Bombay, will shortly join. The self-governing Colony of Southern Rhodesia is joined with the Protectorates of Northern Rhodesia and Nyasaland. Nigeria, the Gold Coast, Sierra Leone and Gambia form the West African Court of Appeal and a permanent President and Associate Justice of Appeal are soon to join the Court. Trinidad, British Guiana, Barbados, the Leewards and Windwards Islands form the West Indian Court of Appeal.

Another important function that Judges perform is the supervision and review of the decisions of magisterial Courts. In some territories, notably West and East Africa, the majority of these Courts are presided over, and must be so for some time, by officers of the Administration. The work of supervision, correction and sometimes admonition is often anxious and delicate. The Judge has to point out that important rules of law are not mere technicalities to be postponed in effectiveness to factual findings, but he must do so in language which should not convey a reprimand to a hard-working officer doing his best to perform duties for which he has no specialized training.

Apart from the actual administration of justice, Judges frequently render service in presiding over Commissions or other inquiries of public moment.

To conclude this reference to the Judiciary, I would add that they have the right only shared with the Chief Secretary to the Government of direct communication with the Governor, and the pre-eminence of the administration of justice is acknowledged by the position of precedence of the Chief Justice immediately after the Governor, while in most dependencies his services are rewarded sooner or later by a knighthood.

Magistracies are the lowest posts in the judicial hierarchy, as Crown Counsel are among the Law Officers. The qualification is three years' practice as barrister or solicitor in the United Kingdom or one of the Dominions. The practice has recently been introduced of making appointments to perform the functions of magistrate and crown counsel in turn to ascertain ultimate suitability for either. A Magistrate's jurisdiction, civil and criminal, varies considerably according to the system prevailing in his particular territory. In parts of Africa, he has very extensive powers and his circumstances differ substantially from those of his English counterpart. I quote from Lord Schuster's introduction to the book "The Magistrate" written by Sir Alison Russell, a former Tanganyika Chief Justice: "An official, alone, among peoples of a different culture who are without the Englishman's hereditary respect for the English law, and his grasp if not

of its details at least of its basic principles, he has to enforce security and order, to administer an alien code and to maintain his own self-respect, while he guards himself from becoming self-important. Much of the code which he administers differs of necessity from that which prevails in his own land." I would add that the power he wields is a test of his sense of proportion and humility of mind. It is no light duty to exercise jurisdiction which is at least that of the Stipendiary Magistrate here and may be equal to that of an English High Court Judge, and to appreciate that a Minister of justice is not an avenging angel, and that justice is not only blind but colour blind. Bacon says " young men are fitter to invent than to judge; fitter for execution than for counsel." I think our apprentices to the judicial trade pass the tests of patience, impartiality and mercy with credit to the honour and glory of British justice. Magistrates, if they make good, in due course graduate to Judgeships and to the intermediate post of District Judge where the local judicial system includes these posts.

I now come to the other principal branch—the Law Officers. It is a trite remark to say that all dependencies must be obedient to the rule of law, but so it is. It is essential, though naturally a little distasteful at times, for the Executive to have to submit to the interpretation of the law by a skilled lawyer, but so it is also. And, as I have had to remind enthusiastic executives, it is easier to get into a mess than to get out of it. The skilled lawyer for these protective functions is the Attorney-General who is not only closely concerned with the administration of justice but also with the justice of administration. He advises the Governor on the legal aspect of Government policy, and all Government Departments on the relevant law. He is an important member of the Executive Council, that body appointed by the constitutional instrument of every dependency to advise or act with the Governor in various matters required by law or sometimes observed in practice. Thus his technical knowledge, and his professional training and experience give him a paramount position to pronounce authoritatively not only on the legality of policy but on its wisdom and justice, particularly in proposed legislation. It is sometimes difficult to convince or persuade eager and energetic executives that a policy they believe to be wise and just is the reverse since it is the business of executives to execute; so the man who says with the voice of authority " this cannot be done " must be tactful, impressive and convincing. A strong, fearless and capable Attorney-General is invaluable to a Government; a timid, vacillating or incompetent Attorney-General is a menace to the governed and a bruised reed to the hand of the Governor. When the Governor in Council considers, as by law he must, the confirmation or otherwise of a death sentence, the Attorney-General's advice on law, evidence and other features of the case where his professional experience is valuable, may decide whether mercy is or is not to prevail.

In legislative matters the Attorney-General predominates. All legislative measures are drafted by him, or by a member of his Department under his direction or supervision. If there is, as there is in the great majority of dependencies, a legislative body, he is a member of it, and introduces and explains most government bills. In the more politically advanced dependencies criticism may be keen and opposition aggressive, so he must be a ready and lucid speaker, resourceful and tactful in debate. His responsibility does not end with the enactment of measures. Laws may be disallowed by His Majesty and are sent to the Colonial Office for scrutiny. The Attorney-General must certify the enactment complies with all legal conditions which are prescribed for validity, and send a report explanatory of its terms. If in whole or in part the enactment does not meet with his own approval he must say as much.

It is perhaps in the field of criminal justice that the Attorney-General's functions are the most important and responsible. There are prosecutions for some offences which cannot be instituted without his sanction and he can put a stop to any prosecution at any stage with a *nolle prosequi*. In some dependencies

he has a power unknown in England, and that is the power of appealing against an acquittal by a Magistrate. Where an accused has been committed for trial the proceedings are forwarded to the Attorney-General who can enter a *nolle prosequi*, remit the case for further investigation, or by himself or one of his subordinates draft the information as the summary of the charges is termed on which the accused is to be tried in the higher Court.

He may appear as advocate for the Government in any criminal or civil case. In the larger dependencies he is probably too busy to do so frequently, but an important or difficult case may require the Government to employ its heaviest artillery and he will force himself to borrow time heavily mortgaged for other purposes.

Then, by Colonial Regulations issued by the Secretary of State to govern conditions of service, the Attorney-General presides over the Committee which investigates cases of misconduct against officers in Government service with a view to disciplinary action. He has the invidious task of framing the charges, and this dual capacity is a tribute to impartiality and judicial balance.

Finally, he is the titular head of the Bar in his territory. As such, though servant of the Government, he must not forget he is a member of a profession without whose aid the administration of justice and maintenance of the rule of law is carried on with difficulty. He must consider their rights and interests, and if necessary be their spokesman in the Courts and before the Government. And it is also his duty to move the Court to take disciplinary action against a delinquent member of the profession, to keep the stream of justice unpolluted by noxious elements, as it is his duty to move that the Court should commit for contempt any person who interferes with or threatens the free and impartial administration of justice.

Anxious as it often is; arduous though it always is; the Attorney-General's work has an absorbing interest, and is a full sized man's job, calling for quick and clear thinking, tact, sympathy and firmness. A friend of mine who had occupied successfully both posts, comparing that of Judge with that of Attorney-General, said the Judge should be easier in mind, since whatever his decision, he has an even chance of being right on appeal, but the Attorney-General's client expects him always to be right. Still, his reward is not only represented by the gratifying feeling when he extinguishes the midnight lamp (as he often does) that his duty has been done, but in the material way he may reasonably expect recognition. The holders of important Attorney-Generalships are frequently given Chief Justiceships, and sometimes do not have to await this promotion before receiving knighthood.

In small dependencies the Attorney-General may be single-handed. In larger he receives assistance according to the volume of work. There may be a Solicitor-General with more than one Crown Counsel. The Solicitor-General's work can also be very arduous, and he will act for his Chief in the latter's absence. Good work should bring him advancement to an Attorney-Generalship, though as the Attorney-General sometimes does, he may elect for a Puisne Judgeship. Crown Counsel occupy the initial positions in the legal hierarchy. Their work is largely forensic. They conduct prosecutions and represent the Government in civil litigation. They also perform such duties of the Office as the Attorney-General may delegate and according to seniority will be called upon to act for the Solicitor-General and perhaps the Attorney-General and if they make good may in due course expect promotion to the higher ranks in the Law Office or to the Judiciary.

The laws administered by the Colonial Legal Service are very numerous. Why is the law of the British Empire not all English? Well, for one thing, English law is by no means perfect and often not suited to local conditions. Then some systems have a religious foundation, and their votaries may be very numerous and important in this dependency or that; other systems have been evolved from customs the preservation of which is regarded with an equal jealousy. The mode

in which the territory has been acquired is frequently a determining factor in its juristic make-up. Some British possessions have been acquired by settlement: Bermuda, Kenya, parts of West Africa. For these the rule of law is that the settlers take there as much of the common and statute law of England as is applicable to their new situation. Other possessions have been acquired by conquest: Jamaica, Trinidad, Gibraltar; or by cession: Fiji, Hong Kong, the province of Kandy in Ceylon. In these alike the rule is that the annexing sovereign can impose such laws as he pleases, but if there are existing laws they remain in force until replaced, and if the terms of capitulation or of the treaty of cession contain, as they often did, an undertaking to respect existing laws such an undertaking is sacrosanct. Jamaica, Trinidad and Gibraltar were captured from Spain. Spanish influence was apparently not important enough to keep out English law. On the other hand in British Guiana Roman-Dutch law was preserved till 1917. In Mauritius there is French law; the terms of capitulation in 1810 importing the preservation of existing laws and customs. In protectorates His Majesty's jurisdiction extends to the introduction of any laws he pleases, but if there is any agreement with the native ruler who accepts protection whereby certain native rights are preserved, the laws are administered so far as possible subject to those rights. In the Territories administered in conformity with a trusteeship agreement His Majesty introduces such laws as he pleases subject again to any conditions the trusteeship agreement imposes.

I propose to describe some of them in terms of judicial administration. First, Ceylon as presenting the most varied, and by its fully advanced stage of political and social development perhaps the most interesting justiciable matters. When the Dutch settlements in Ceylon, known as the Maritime Provinces, were captured in 1796, Roman-Dutch law was perpetuated by proclamation in the belief that it was the law applicable not only to the Dutch residents but to the Ceylonese population also. No harm has been done by this thoroughgoing application. I am an admirer of the system which has in some respects an advantage over English law. But the Dutch law of the 18th century could not be adequate to the needs of a developing world; and in a British possession there was no justification in looking to Holland for modern juristic innovations. Accordingly in commercial matters English law applies and cases relating to, say, insurance policies, bills of lading and bills of exchange will be tried according to English common law or to an enactment based on English law. There is a case that came to my own notice. The plaintiff sued on a promissory note which the defendant gave to secure an undertaking to marry the plaintiff's daughter. The defendant's ardour being cooled, he called off the marriage, alleging that the planets were not favourable for the projected wedding date. Astrology plays an important role in Oriental matrimonial affairs. The plaintiff took action on the promissory note; the defendant successfully maintained that under the English law applicable it was against public policy to give a promissory note to secure an obligation to marry a particular person. On the other hand the lady herself might have had an action for breach of promise of the contract for marriage under Roman-Dutch law had the promise been made to her in writing, but the perfidious defendant had not so committed himself. Torts or civil wrongs are tried according to Roman-Dutch law, and unlike English law there is no difference between spoken and written defamation. Here is an interesting petition for divorce on the ground of cruelty. The petitioner, a Ceylonese lady, was married in Ceylon to an Englishman domiciled in England. Throughout the Empire, and indeed in most other countries, jurisdiction in divorce depends on the domicil of the parties. However, an Act passed in 1926 called the Indian and Colonial Divorce Jurisdiction Act relieved persons of English or Scottish domicil from the inconvenience of having to bring their divorce petitions in England or Scotland, as the case might be, when they are residing for instance in Ceylon and the matrimonial offence was committed there or the marriage celebrated there, and the matrimonial

offence is one for which the Court at home will give relief. In this case the petitioner brings her action in the Supreme Court of the Island, but she must prove her English domicil otherwise the Supreme Court has no jurisdiction. She succeeds, fortunately for her, as the Court will hold that a wife's domicil is that of her husband. I say fortunately, because if it decided that her domicil were Ceylonese the action would lie in a District Court in Ceylon and Roman-Dutch law would apply and cruelty is not a matrimonial offence under that law. As in every other territory within the Empire, personal liberty is safeguarded by *habeas corpus,* and I was a member of the Court in Colombo which directed the release of an applicant for the writ who had been detained by the police pending his deportation pursuant to an order made by the Governor. This order was declared to be invalid, and the fundamental principle obtaining wherever His Majesty's Courts function that no one can be deprived of liberty save by due process of law was vindicated. English law is also represented by other so-styled prerogative writs one of which, *mandamus,* is another example of the vindication of the rights of the individual to challenge executive disregard of law in that a public authority can be directed by the Court to perform a duty imposed on him by law. I have a recollection of a very interesting case worth the mention because it involves yet another system of law. In this instance, the application was made for a *mandamus* to direct the Registrar-General of documents to remove from the register he has to keep of Buddhist priests the name of a priest (or Bikku as the Singhalese call him) de-frocked by his spiritual superior. This involved the question in Buddhist law of the power to expel from the priestly order, and the argument once a priest always a priest was rejected by the Court. Two other systems of law purely local are also administered. Kandyan natives of the Midland Province still preserve their ancient laws secured to them by the British undertaking at the Kandyan Convention in 1815 when the Kandyan Chiefs agreed to the transfer of their country to British dominion, when the last King was deposed. One feature of this legal system is matrimonial duality—marriage in *binna* and marriage in *diga.* In the former the husband goes and lives in his wife's family, completely losing his individuality; in diga the wife is brought into the husband's home. It is very important to matters of property succession to prove in which category a marriage fell. The other local system is known as the *thessawalami.* It is the personal code of that large community the Tamils who are Hindus. This is a code of domestic law of some elaboration and under it the widowed father of very young children who remarries is required to surrender all property brought by the deceased wife on marriage and half the property acquired during the marriage. He then has no further obligation to maintain these children. The law of Islam is also represented, as there is a community of part Arab origin known for some reason or other as Moors and numbering about 200,000, and they are subject to Muhammadan law in regard to marriage, divorce, guardianship, succession to property and certain other domestic matters.

I come now to the criminal side of the work of the Courts. Those cases committed for trial to the Supreme Court are tried by a jury consisting of seven. The jury system was introduced into Ceylon over 100 years ago. The judge, though he cannot disregard or qualify the jury's verdict, may if he disagrees with it request the jury to think again. If they think again, but refuse to think differently, the verdict must be accepted. The criminal law is based upon the Indian Penal Code which has come to be associated with the great name of Lord Macaulay, who was President of the Commission in India which prepared a code for the country at his suggestion, a code which should be in his own words "framed on two great principles—the principle of suppressing crime with the smallest possible amount of suffering and the principles of ascertaining truth at the smallest possible cost of time and money." It was in draft when he left India in 1838 but was not passed into law till 1860, the year after his death. It has been spoken of as a model of codification and a perfect piece of legislation, and

though in my opinion it is neither, yet it is a most effective instrument of criminal justice, taking scientific account of the psychological characteristics and peculiar outlook of the people for whom it was conceived, and having the singular virtue of punishing every anti-social act or omission deserving punishment, while assigning appropriate punishment for different degrees of culpability. Despite the English foundation, there are not a few deviations from English law, but the material principles appearing in the Code enable English decisions to be freely used in interpretation. Sir James Fitzjames Stephen, the famous English Judge, author of the Indian Evidence Act, said that Macaulay's " Draft gives the substance of the criminal law of England down to its minute working details, in a compass which by comparison with the original may be regarded as absurdly small. The Indian Penal Code is to the English criminal law what a manufactured article ready for use is to the materials out of which it is made." Surprisingly few amendments have been made in the 90 years of its existence, and in addition to Ceylon it has been adopted in all the territories which can be grouped under the term Malaya. Together with the Indian Code of Criminal Procedure it applied in the East African territories until superseded in 1930 by codes based on English law, which I thought then and think now was not a change for the better.

Evidence in all the Courts of Ceylon, civil and criminal, is an adaptation of the Indian Evidence Act, the work in 1872 of Sir James Fitzjames Stephen, at that time Legal Member of Council in India. This Act codified English principles of evidence not only as they were in Stephen's day but in a number of respects as he thought they ought to be, at any rate for the country which the Act was planned to serve. In his book " An Introduction to the Indian Evidence Act," he says " The Indian Evidence Act is little more than an attempt to reduce the English law of evidence to the form of express proportions arranged in their natural order with some modifications rendered necessary by the peculiar circumstances of India." I allude to one innovation as exhibiting the solicitude that English justice, wherever administered, has for the accused person. In English law if a confession is voluntarily tendered, that is to say not induced by threat or promise, such as: " it will be the better for you to tell me," or " it will be the worse for you if you don't," there is no restriction on admissibility, but under the Indian code a confession to a police officer of any rank, however freely made it may seem, is ruled out absolutely. The Criminal Procedure Code is adapted from the Indian Code, and in it are two interesting features which deviate from English criminal practice. The Attorney-General may appeal on fact or law from an acquittal in a Magistrate's Court. To the English mind this does, on first acquaintance, administer something of a shock, but familiarity breeds not contempt but respect, and a number of miscarriages of justice would go unremedied otherwise. After all, the public as well as the accused has its rights and though we may admit it is better for ten guilty to escape than that one innocent should be convicted, there is no virtue in letting the guilty escape. The other feature is the power of revision that the Supreme Court has over the decisions and sentences of lower Courts in order to correct a manifest injustice of any kind where an appeal could not lie. This is particularly useful in order to increase an obviously inadequate sentence, and the Court can act on application or of its own motion on any information it may receive. I must finally refer to the Court of Criminal Appeal which was established in 1940 by an enactment absolutely identical with the English Act of 1907, but for one important difference, and that is the power to order a new trial. The English Court of Criminal Appeal has frequently deplored the absence of such a provision. I selected Ceylon as the prime example of complexity of legal systems, but there is much variety to be found in other territories served by the Colonial Legal Service. First then, the East African territories, Kenya Colony and Protectorate, Tanganyika Trust Territory, Uganda Protectorate, and Zanzibar Protectorate. The same

laws largely apply to all, English common law, equity, certain statutes, and an English criminal code, a criminal procedure code partly English partly Indian to suit local conditions, Indian evidence and certain other adapted Indian Acts, Hindu law, Muhammadan law applicable to the different Islamic sects. In Kenya and Zanzibar, Europeans charged with serious offences are triable by jury, non-Europeans by a judge sitting with two or more laymen called assessors and in Tanganyika and Uganda all such cases without distinction of race are tried by the assessor system. This system derives from India. The Judge sums up and asks each assessor individually for his opinion. But the Judge has the final responsibility and need not accept the opinion of the assessors. He must, however, write a reasoned judgment and as the merit of a jury's verdict is its collective character, the merits of the Judge's decision depend upon the soundness of his reasons in law and fact. In no sense are the assessors jurymen and a convicted person cannot urge in appeal that the assessors were for acquittal. A word or two about Zanzibar's special position. The Protectorate is a Sultanate and a dual jurisdiction prevails there. The Sultan's Courts have full jurisdiction over all cases in which his subjects alone are concerned. His Britannic Majesty's Courts have jurisdiction in all cases in which British subjects or other non-Zanzibaris enjoying British protection are concerned, whoever the other party may be. Both sets of Courts have since 1923 been staffed by the same presiding officers and administer the same criminal law, procedure and evidence. In the British Courts, however, the law in civil cases may be English or Indian, Hindu law or one branch or other of Islamic law according to the race or religion of the parties and the subject matter. For instance, an Indian merchant sues an Arab clove-grower for non-delivery of cloves. The Zanzibar Contract Decree based on English law by way of adaptation of the Indian Contract Act applies. The question is how the estate of a deceased Khoja (a member of the sect whose supreme authority is the Aga Khan) is to be divided. Though the Khojas are Muhammadans they observe the Hindu law of succession and inheritance. The Court decides that the live Muhammadan becomes a dead Hindu.

The civil law in the Sultan's Courts is the law of Islam, but, conscious of the shortcomings of the Muhammadan rules of evidence in respect to modern life, in 1917 the Sultan decreed that in all cases civil as well as criminal in his Courts the Indian law of evidence should apply. In this way, English principles governing the administration of justice are made to prevail in a Muhammadan State under the influence of British conceptions of justice, just as Muhammadan criminal law was in 1909 replaced by the Indian Penal Code.

In the mainland territories of Kenya, Tanganyika and Uganda though the laws are generally very much the same as in Zanzibar, there is an important element there which is absent in Zanzibar, and that is native law and custom. In Zanzibar the natives, mostly Swahili, are Muhammadans. On the mainland though Muhammadan groups are to be found the great bulk of the natives follow native law and custom in their social life, save in matrimonial matters where any of them are Christians. In many districts there are Native Courts administering the native law and custom of the district. The local administrative officers exercise appellate and supervisory powers over them and in some instances the Supreme or High Court is the final authority. It is not only in Native Courts, but in British Courts also that native law and custom must be accepted. It is provided by law that in all cases where natives are parties regard must be had to native law and custom, provided (and this is all-important) it is not contrary to justice and morality and not inconsistent with any enactment of the territory. Morality and justice must of course mean British and not African conceptions of those attributes. Were that not so British justice would be looking in two different directions at once. At the same time the Court has to be wary not to condemn a custom merely because it does not accord with a European mode of life. The distinction between the unusual and the unjust is not always easy to appreciate.

I recollect a case in Tanganyika where a native who had been defrauded by a native official of a sum of money obtained judgment for the amount, and sought execution by attaching an ox belonging to the wrongdoer's father. Evidence was led that according to the custom of the tribe to which both belonged a wrong by a son should be satisfied by the father. But the High Court held that such a custom, when the son was of full age and independent, was contrary to natural justice, yet one can see the germ of reason in it. I should here like to make a passing reference to the occasional instances of witchcraft which come before the Courts in all parts of Africa where despite the spread of civilization there are still many dark pockets where terrible deeds are done. The sacrificial murders on the Gold Coast three years ago, the murders by the Lion Society of Tanganyika last year and the periodical outbreaks of the Leopard Society in West Africa will come to mind. In both East and West Africa legislation punishes pretenders to the practice of witchcraft, and those who possess instruments for use in such practices. The local Matthew Hopkins who claims to be able to " smell " out practitioners of the black art uses a mirror to summon up their images. And as may be appreciated, a public charge of witchcraft is so serious as to be criminally punishable.

The legal systems of the West African territories are simpler than those of East. These are the Gambia Colony and Protectorate, the Sierra Leone Colony and Protectorate, the Gold Coast Colony, Ashanti, the Northern Territories of the Gold Coast and Togoland under trusteeship, the Nigeria Colony and Protectorate and the Cameroons under trusteeship. With the exception of native law and custom and in certain localities Muhammadan law, English law, procedure and evidence apply. Cases committed for trial by the Supreme Court are, irrespective of the race of the accused, tried by jury or with the aid of assessors. Murder is always tried by jury. Native law and custom figures rather prominently on the Gold Coast, it is bound up so much with tribal life, and a question as to the claim of a chief to be enstooled, as accession to the chieftaincy is called, or the boundary line between two tribal areas may run the entire course of litigation from native tribunal to Privy Council.

In the West Indies, Bermuda, British Guiana and British Honduras the system with one exception is entirely English, and both civil and criminal trials are held with a jury. That exception is St. Lucia, one of the Windward Islands which has a civil code based upon pre-Napoleonic French law with some modifications made to suit more modern conditions.

In Gibraltar, law, procedure, evidence and the judicial system are English. In Cyprus, however, there is considerable variety. Of the population of some 400,000 more than 80 per cent. are Greek, the rest Turks. Cyprus was transferred by Turkey to Britain in 1879 and Turkish influence is seen in the existence of certain Ottoman laws, notably the Land Code, and the reservation to tribunals of the Greek Orthodox Church or the Islamic faith as the case may be, of certain matters such as marriage and divorce, with appeal to the Supreme Court in Muhammadan cases. The composition of the Courts is also an Ottoman survival, the Bench of the Supreme Court and the District Courts consisting in some aspects of jurisdiction of a President and two other judges. In addition to Ottoman law, English common law, equity and certain statutes apply and of course the English rules of evidence also.

In Mauritius the law is largely based on the Code Napoléon and other French laws which were in operation when the island surrendered to British forces in 1810. These have been modified from time to time by local enactments and again, the English rules of evidence also apply. Criminal trials in the Supreme Court are by jury.

In Hong Kong English law, procedure and evidence and the English judicial system apply though in certain family matters the Courts take cognisance of Chinese customary law as do the Courts in Malaya where there is a huge Chinese

population. The Malayan Courts administer both English law and adaptations of various Indian enactments, and as the Malays are Muhammadans the law of Islam is administered in their cases of marriage, divorce and succession.

Though the law in the Empire is multiform the principles which regulate the administration of justice are uniform throughout. A Court in Lagos, Singapore or Nairobi must be as obedient to those principles as a Court in the Strand or the Old Bailey. For this is British justice. Juries everywhere must be charged that if they have any reasonable doubt they must acquit, and that to weigh doubt they should exercise the same judgment as in their private affairs. The Judge or Magistrate must aid the undefended accused; he must observe the rule that, in the words of Lord Sankey in the Woolmington case, runs like a golden thread throughout the web of the English criminal law, namely that it is the duty of the prosecution to prove the prisoner's guilt. No Judge or Magistrate should try any case in which he has a personal interest. Evidence of the bad character of the accused must not be given unless he puts his character in issue. Counsel for the prosecution is a minister of justice, not an instrument of vengeance; he must not press the case and indeed should bring forward everything he knows in the accused's favour. A person once convicted or acquitted may not be tried again for the same offence. That these basic principles and others must be observed by all British Courts is patent from reported cases in the dependencies and in the Privy Council. Public confidence in the Courts is only to be won by observing the principles expressed by Lord Chief Justice Hewart that it is not merely of some importance, but it is of fundamental importance, that justice should not only be done, but should manifestly and undoubtedly be seen to be done. Sir Joshua Williams, a famous New Zealand Judge, put it no less effectively when he said " we must not only avoid injustice but also the appearance of injustice."

I have sometimes been asked two interesting and pertinent questions. The first has been put to me in this way. " How do you justify the application of English principles of justice to so many different peoples whose outlook and mentality vary so much from our own, especially when English ideas pass their understanding?" We believe that these ideas are the best that can regulate our administration of justice, and an Englishman because he is an Englishman and not someone quite differently constituted cannot adopt another person's conception of justice. Whether there is really much difference and whether our ideas are not understandable by those others, I will not stay to discuss, because if they are not understandable it is a pity, but it must not be allowed to stand in the way of doing what we believe to be right since in the last resort we govern other peoples by our conscience and not by their understanding. The other question is a practical one. How can an English-trained lawyer pretend to administer so many widely divergent systems of law as a Judge in the Colonial Legal Service, in a career such as I have described, may be called upon to handle? This can best be answered in the words of Lord Macmillan. Speaking at the Jubilee celebrations of the Society of Comparative Legislation he said of the work of the Privy Council " Nothing is more educative to one who has been brought up in one system of law than to see how in other systems the same problems, the ancient problems which have always confronted humanity have been faced and tackled. People have sometimes said to me ' how on earth do you manage in the Judicial Committee of the Privy Council to administer Hindu Law one day, Muhammadan Law the next day, then French Law, and then again Roman-Dutch Law, and so on through the whole gamut of jurisprudence?' At first it seemed an impossible task, but after a good many years there, this great truth has been borne in upon me—and I have realized it more and more from year to year—that, after all, throughout the world, Justice is one; and that the methods, the technique and the forms which it assumes in different countries are only its trappings. One finds in every one of these different systems which one has to administer, the same object in view—to do what is right and just.

The forms in which Justice clothes itself in different lands are important no doubt, but they are not of the essence. It is not difficult in all systems to discover what is really the object in view and the essential purpose to be achieved. Justice is simple and single: its forms are many and often complex. But if your mind is set upon endeavouring to do what is just and right you will find that forms are comparatively unimportant." To endeavour to do what is just and right is the aim of the Colonial Legal Service, and I am bold enough to claim for its members that they deserve to achieve their aim.

ENEMY LEGISLATION AND JUDGMENTS IN BURMA

[*Contributed by the* Hon. Mr. Justice E. Maung, M.A., LL.B., *Judge of the Supreme Court and lately Judge of the High Court of Judicature, Rangoon.*]

After the entry of Japan into the Second World War, Rangoon was first attacked from the air on December 23, 1941. A second raid followed on December 25. Extensive damage was done to the City of Rangoon and general evacuation followed. Thereafter various parts of Burma were attacked from the air; and aerial attacks upon Rangoon and its vicinity, though not on any serious scale, occurred almost daily.

The result was that in January, 1942, the Governor of Burma promulgated the Courts (Emergency Provisions) Ordinance of 1942 suspending the civil side of the High Court in Rangoon and enabling the Chief Justice to hold Court at any place in Burma that he might consider suitable. This ordinance also contained a provision which later found a place in the Courts (Emergency Provisions) Act of 1943 whereby all Courts in Burma administering civil justice were to be deemed for the purposes solely of limitation of actions to be closed and to remain closed till such time as the Governor might make a declaration in that behalf. The declaration bringing to an end this suspension provision was later made to operate from March 31, 1947.

Rangoon was occupied by the enemy on March 8, 1942, and Burma, except for some small areas, was occupied by the enemy on May 4, 1942. Thus practically the whole of Burma came under effective enemy occupation from May 4, 1942; and Rangoon was re-occupied by the forces of the lawful Government on May 8, 1945. Some parts of Burma, especially those to the east of the Sittang River, remaining under enemy occupation till Japan surrendered in August, 1945.

On July 7, 1942, the Commander-in-Chief of Japanese forces in occupation of Burma promulgated Ordinance No. 6, the long title of which is " An Ordinance Providing for the time being a Machinery for Judicial Administration in Burma under the Nippon Military Government." Clause 2 of the ordinance provides:—

> " The constitution and jurisdiction of the Courts and the function of public prosecutors shall, for the time being, be the same as existed in Burma previously; except otherwise provided by this or any other ordinance, expressly or by implications."

Clause 4 reads:—

> " Unless otherwise provided in this or by any ordinance, regulation, etc., the law that shall be administered in the courts hereby constituted, shall for the present be essentially the same as was being administered in Burma before the commencement of this ordinance;
>
> " Provided that any law which is contrary to the spirit for the establishment of the new order in Great East Asia, as is the aim and object of the Nippon Military Government, shall not apply."

By clauses 5 and 6 of the ordinance the Commander-in-Chief directed that the original jurisdiction that formerly was exercised by the High Court should be exercised by the Rangoon City Court, that the High Court should thenceforth

be a Court of Appeal and that as an appellate Court the jurisdiction of the High Court should be co-extensive with the appellate jurisdiction previously exercised. The re-opening of the High Court thus confined to the exercise of appellate jurisdiction, however, was postponed by the ordinance till such time as the Commander-in-Chief by a later notification might appoint.

Later, it was decided to name the appellate Court " The Supreme Court " instead of as it was originally contemplated " The High Court." The change was, however, merely in name; the Supreme Court when it came to be opened exercised such appellate powers as used to be exercised by the High Court before the Japanese occupation.

By the same ordinance, all subordinate courts which were functioning before the Japanese occupation outside the City of Rangoon were revived.

Ordinance No. 4 of 1942 of October 9, 1942, promulgated with the approval of the Commander-in-Chief of the forces occupying Burma, effected minor amendments in the judicial system of the country. These amendments were necessitated by the fact that many senior Judges in Burma left the country prior to the occupation by the enemy. Accordingly, areas that used to come under the jurisdiction of separate Courts were amalgamated and placed under the charge of one senior Judge, who, after the amendment, was to be called the Divisional Judge.

During the occupation of Burma by the enemy the substantive law applied in the administration of criminal and civil justice by the Courts which were revived by the enemy or by the Rangoon City Court, which was a new Court set up by the enemy, was—with minor variations—the law as it was before the enemy came into Burma. Legislative measures taken by the enemy or under instructions from the enemy during the occupation of Burma, did not effect serious change in the civil and criminal law. The result was that when Burma was re-occupied on behalf of the lawful Government, the judgments and decrees of the Courts which functioned during the occupation by the enemy, were accepted as valid and binding. In *The King* v. *Maung Hmin*[1] (1946 *Rangoon Law Reports* 1) a Special Bench of the High Court had to consider the effect of a conviction for murder registered by a Court of Sessions functioning during the occupation. It was held that the Courts functioning during the Japanese occupation were Courts constituted according to the municipal law of Burma and that these Courts administered the municipal law. The provisions of the ordinance were considered and it was said of the ordinance:—

> " The plain meaning of its language is that the Japanese Commander-in-Chief continued in force the old Courts and the old law. To my mind, no other interpretation of the language of this order is possible. So far as we are aware, no alteration or amendment of these provisions of this order was made during the enemy occupation. Hence the Courts constituted under the municipal law of Burma continued to function, and the law administered by these Courts continued to be the municipal law of Burma. The learned Advocate-General has argued that the Courts during the Japanese occupation were not Courts constituted under the law of Burma because the Japanese authorities made some changes in the presiding Judges and Magistrates. He pointed out that under s. 110 of the Government of Burma Act District and Sessions Judges have to be appointed by the Governor, and under s. 12 of the Code of Criminal Procedure, Magistrates are appointed by the Governor. As regards the latter part of this contention, I would invite attention to s. 40 of the Code of Criminal Procedure, but generally I think this argument involves a confusion between personalities and Courts. The Courts were the Courts established under s. 6 of the Code of Criminal Procedure, and although the presiding Judges and Magistrates may not have been appointed strictly in accordance with the provisions of that Code the latter consideration appears to me to be

[1] To be reported in *Annual Digest and Reports of Public International Law Cases*, 1943–.

public order and safety, and therefore of maintaining Courts of Justice for irrelevant. The occupying power has cast upon it the duty of maintaining this purpose. Surely the occupying power must have the necessary powers to enable it to perform this duty; the appointment of presiding officers for these Courts is an ancillary power which the occupant must be able to exercise in order to enable him to carry out his duty."

In *Maung Hla Maung* v. *Ko Maung Maung & one* (Civil Reference No. 2 of the High Court of Judicature at Rangoon) and in *Abdul Aziz* v. *The Sooratee Bara Bazaar Co. Ltd.* (Civil Reference No. 5 of the High Court of Judicature at Rangoon) the Full Court held that the City Court of Rangoon which was a new creation by the Japanese Commander-in-Chief and in which was vested the jurisdiction that used to be exercised before the occupation by two Courts, namely, the Rangoon Small Causes Court and the High Court on the Original Side, had jurisdiction to give valid judgments binding the Courts in Burma in regard to matters over which the Commander-in-Chief had vested the Court with jurisdiction to decide.

Later in *U San Wa* v. *U Ba Thin* (Civil Reference No. 2 of 1947 of the High Court, Rangoon), another Full Court held that the Supreme Court established in Burma by the Japanese authorities during their occupation was a duly constituted court of law, that decrees and orders made by it are valid in all respects and of the same effect as if they had been made by the High Court of Judicature at Rangoon either before or after the Japanese occupation, and that the High Court of Judicature in so far as relates to decrees and orders made by that Supreme Court is successor thereto.

It is of interest that a Full Court of four Judges of the Supreme Court during the occupation, two of whom had been Judges of the High Court of Judicature at Rangoon before the occupation, decided in *A.S.N.S. Firm* v. *Mg Po Khin & one* (Civil Reference No. 5 of 1943 of the Supreme Court, Rangoon) that the national status of the inhabitants of Burma did not suffer any change as a result of the occupation of Burma and that British subjects in India could not be treated for the purposes of proceedings before the Courts in Burma as alien enemies. This decision was accepted without protest by the enemy military administration in Burma.

The occupying army introduced military currency notes primarily for its transactions with the civilian population. The notes introduced were of two types, one type originally intended for use in Malaya and another type intended for use in Burma. By a Military Ordinance of May 1, 1942, both types of military notes were ordered to be used in Burma as currency. The matter was further regulated by the Burma Monetary Arrangements Ordinance of 1942 issued under the authority of the Commander-in-Chief of the Imperial Nippon Army in Burma on September 15, 1942. This ordinance provided that " currency which was legal tender in Burma on December 8, 1941, shall continue to be current in Burma in the same manner and to the same extent and as fully as heretofore . . ." It also decreed that Japanese Government military currency notes of the denominations of " RUPEE " and " DOLLAR " be in circulation simultaneously with the currency of Burma and be deemed to be of the same value as the unit of the legal currency.

For about a year following the occupation of Burma, the legal currency and the Japanese Government military notes were in circulation side by side; but by 1943 the lawful currency had disappeared from circulation. It remained hoarded and was, after the first quarter of 1943, scarcely to be seen in circulation. The result was that most transactions after the first quarter of 1943 were conducted through the medium of the Japanese Government military notes. Sales, mortgages and contracts entered into during the Japanese occupation later gave rise to disputes, and *Sein Kho* v. *Hla Din* (Civil Appeal No. 15 of 1946 of the High Court, Rangoon) was the first case calling for determination by the High Court.

The essential facts in the case were that the plaintiff had advanced to the defendant at the latter's request Rs. 750/– in Japanese military notes and the defendant executed an instrument wherein he undertook to pay to the plaintiff on demand Rs. 750/–, the instrument being silent on the question whether the Rs. 750/– were to be paid in legal currency of Burma or in Japanese military notes. It was held that there was a latent ambiguity in the undertaking open to explanation by parol and that, thus explained, the undertaking was in terms of Japanese military notes. It was further held that the occupant was not entitled to set up a parallel system of currency or to relate it to the legal system; but that such military notes, used as media of exchange, had during the occupation certain purchasing power, diminishing in value with the progress of the counter-offensive by the Allied forces. Accordingly it was ruled that the instrument was not a promissory note in that the undertaking embodied therein was not in respect of a sum certain, but that the defendant was under a legal duty to pay to the plaintiff the barter value, as at the date of the instrument, of the nominal sum of Rs. 750/– in Japanese military notes.

This decision and two decisions which followed it were considered by a Full Court of five Judges in Civil Reference No. 5 of 1947 of the High Court of Judicature at Rangoon. The principles enunciated by me in the earlier case were accepted by the Full Court and the Chief Justice said:—

> "We must regard Japanese notes as documents with a value in exchange for goods but a loan of them was not a loan of money. Consequently, a so-called promissory note to pay such and such a sum in rupees (meaning Japanese rupees) was a promise to pay what the parties mistakenly regarded as money, and could not in those circumstances be a valid promissory note at all. None the less, people all over the country were lawfully doing work for others on delivering to them these Japanese notes or documents, and the persons who got them enjoyed a benefit for the time being."

The facts in *Ba San* v. *Hoke Wan* (Civil Second Appeal No. 37 of 1947 of the High Court, Rangoon) are interesting though it does not appear that reasonable doubts can be entertained as to what the decision should be. On November 28, 1936, an on demand promissory note for value received was executed by the respondent in favour of the appellant; and as the promissory note remained outstanding till 1944, the appellant obtained judgment on the note in January, 1945. The area where the Court functioned was re-occupied by the Allied forces four months later; and when the re-occupation was imminent, the respondent without notice to the appellant deposited in Court Japanese military notes of the nominal value of the decree. Normally, on such deposits being made the Court would have directed issue of notice to the appellant whereupon it would be open to the appellant to raise objections on the sufficiency of the payment, followed by an adjudication by the Court. In this case, however, because immediately following the deposit conditions in the area were such that the Court could not function further, no notice could be directed by the Court. On these facts the respondent claimed that the judgment against him had been fully satisfied and his claim was upheld by the lower Courts on the ground that a judgment recorded during the occupation must necessarily be in terms of such currency as was then enforced by the occupying power. On appeal to the High Court it was held that the Courts are but machinery for the declaration and enforcement of rights of parties, that the rights under the transaction were to receive payment in lawful currency and that accordingly the judgment in his favour must be taken to have been made in terms of lawful currency of the land. It was also pointed out that if after the issue of notice to the appellant, the Court during the occupation had rejected his objections to the sufficiency of the payment then made into Court, that decision, though not correct in law, would operate by way of *res judicata* as between the parties.

Following these decisions the Legislature enacted the Japanese Currency

(Evaluation) Act, 1947, of which ss. 2, 3 and 4 are reproduced:—

" 2. In this Act unless the context otherwise requires:—

(*a*) ' Japanese currency notes ' means notes issued by or under the authority of the Japanese Military Administration of Burma during the Japanese occupation;

(*b*) ' legal currency notes ' means Burma notes as defined in the Currency and Coinage Act, 1946, including currency notes issued under the provisions of the said Act;

(*c*) ' coin ' means coin which is for the time being legal tender in Burma, including Government of India coins and one rupee notes.

" 3. (1) Notwithstanding anything contained in any other law for the time being in force, where any debt had been incurred or contractual obligation entered into during the period of the Japanese occupation, which could have been discharged by payment in Japanese currency notes, and if any such debt or contractual obligation or any part thereof remained unsatisfied or undischarged at the time of the British Military re-occupation of the area where such debt or contractual obligation was incurred or entered into, the said debt or obligation, or such part thereof as shall have remained unsatisfied or undischarged as aforesaid, shall be satisfied or discharged by payment in legal currency notes or coins to be calculated in accordance with the value of the Japanese currency notes in column III as indicated in the corresponding value of legal currency notes or coins set out in column II, in respect of the debts or contractual obligations incurred or entered into during the corresponding period specified in column I of the Schedule hereunder:—

SCHEDULE

Period	*Legal Currency Notes or Coins*	*Japanese Currency Notes*
(I)	(II)	(III)
Calendar year 1942.	100	100
Calendar year 1943.	75	100
Calendar year 1944.	40	100
Calendar year 1945.	5	100

(2) Where a decree has been or is passed in respect of money due under any debt or contractual obligation of the description referred to in subsection (1), the amount found due under the said decree shall be discharged in legal currency notes or coins on the same scale of evaluation of the Japanese currency notes as set out in the Schedule to subsection (1).

" 4. Notwithstanding anything contained in any other law for the time being in force, where any debt or obligation, whether contracted or incurred before or during the Japanese occupation of Burma, had been paid or discharged wholly or partially in Japanese currency notes during the Japanese occupation of the area where the payment was made and the payment had been accepted, such payment shall be deemed to be payment in legal currency notes of the same face values, as if the Japanese currency notes were legal currency notes at the time the payment was made."

Section 7 of the Courts (Emergency Provisions) Act, 1943, prescribes:—

" The Civil Courts of British Burma shall be deemed to be closed, within the meaning of s. 4 of the Limitation Act, from the eighth day of December, 1941, until such date as the Governor may, by notification, prescribe."

The date prescribed in this behalf is, as I have already indicated, March 31, 1947, with the result that suits and other proceedings which were not barred by limitation on December 8, 1941, could be instituted as late as March 31, 1947.

The Liabilities (War-time Adjustment) Act, 1945, as its preamble sets out,

was enacted to confer on Courts certain powers in relation to remedies in respect of non-payment of money and the non-performance of obligations and to provide for the adjustment and settlement of affairs of persons financially affected by reason of war circumstances. One of its provisions permits the execution of a decree or order for payment for recovery of money arising from contractual liability incurred prior to the coming into force of the Act only if the Court is satisfied that in spite of war circumstances the debtor is liable to pay his debts. This Act also enables the Court to stay proceedings in insolvency where the Court is satisfied that the debtor's inability arises out of the war circumstances. Moreover, it enables the Court to settle an equitable scheme between a debtor who is in financial difficulties owing to war circumstances and his creditors in such manner as will enable the debtor, if he carries on a business, to preserve the business.

The Accrual of Interest (War-Time Adjustment) Act, 1947, provides that no interest shall accrue or be payable upon any loan or mortgage other than usufructuary mortgage, made in Burma before May 5, 1942, for or in respect of the period which falls within December 8, 1941, and March 31, 1947. This Act was enacted as, in the interest of creditors who evacuated from Burma in 1942, time for instituting suits on their claims being extended to March 31, 1947, it was considered equitable that the debtor should not be saddled with interest for the period in respect of which the creditor's right to sue had been extended. It was also felt that difficulties of communication between the creditor and the debtor arising out of war circumstances, in many cases, was responsible for the liabilities being not discharged earlier.

On the advent of the enemy, general evacuation took place with the result that owners of movable property as also of immovable property left their property open to persons having no right to such property to appropriate the same. Moreover, the invading army in many cases seized goods and other movable property and later transferred them to others. Accordingly, it was found necessary to enact the Custodian of Movable Property Act, 1945, and the Lands Disputes (Summary Jurisdiction) Act, 1945, instituting machinery for summary determination of the right to possession of movables and immovables. The Custodian of Movable Property Act provides that,

> " Where owing to circumstances arising out of the war an owner of movable property relinquished possession thereof within British Burma it shall be presumed, until the contrary is proved, that he has continued to be the owner of such property and that he has had no intention of abandoning the same or any rights thereto."

Under this Act on proof by the claimant that he was on December 8, 1941, the owner of any movable property the burden shifts to his opponent to establish that the latter derived lawful title thereto through the claimant.

Similar provisions are enacted in respect of immovables by the Land Disputes Act. In respect of immovables the tribunal established under the Act does not enquire into the right to possession of the parties at the date of the dispute before it. The only fact relevant at such enquiries is that of actual possession on December 8, 1941. The effect of these two Acts is that the present holders of movables and immovables who derive their claims through the enemy Government or members of the occupation forces or enemy civilians, who had, during the occupation of Burma, been carrying on trade or business in Burma, are not treated as having a valid title to such movables or immovables.

A major problem in Rangoon was in respect of monthly leases of immovable property. Most buildings in Rangoon were and are held on monthly tenancies. Bombing of Rangoon by the enemy and the invasion made tenants leave their tenancies without notice to the lessors. It is therefore provided by the Monthly Leases (Termination) Act, 1946, that if a lessee of immovable property from month to month ceased to occupy or be in possession of an immovable property

by reason of the occupation by the enemy of the place where the immovable property which is the subject of a lease is situate, the lease of such immovable property shall be deemed to have been determined with effect from the end of the month in which the lessee so ceased to occupy or be in possession of the property. The lessee is absolved from all liability for payment of rent from the date on which the lease is deemed under the Act to have been determined.

Transfers of immovable properties generally are required under the law of Burma to be registered in Registries established by the State. For a few months following the occupation of Burma there were no Registries functioning in Burma, but by the first quarter of 1943 in most areas in Burma occupation authorities set up Registries where such transactions could be registered. Transactions so registered are accepted as valid and given effect to. Instruments registered during the Japanese occupation may under the Registration (Temporary Provisions) Act, 1947, be placed on record afresh, but the failure to have them recorded under the Act would not affect the registration during the occupation adversely. Instruments executed during the occupation but not then registered are permitted to be registered beyond the period prescribed.

Stamp duty paid during the occupation is recognized and instruments bearing such stamps as were prescribed by or on behalf of the occupying Military Administration are deemed duly stamped.

Marriages by Registrars appointed by the occupation authorities and divorce granted by the Courts during the occupation are accepted as binding.

ENEMY LEGISLATION AND JUDGMENTS IN THE LIBERATED COUNTRIES: THE PHILIPPINES

[*Contributed by* E. Arthur Perkins, Esq., *of Manila.*]

Introductory.—At the outset it is deemed advantageous, if not necessary, for a clear understanding of the legal questions that have subsequently arisen, to set forth briefly the orders and proclamations by which the Commander-in-Chief of the Japanese Army of Invasion established the governmental and administrative structure for Japanese rule over the occupied Philippines.

On January 2, 1942, the Japanese forces occupied the capital city of Manila, and on the next day the Commander-in-Chief proclaimed " the military administration under martial law over the districts occupied by the Army," and that " so far as the Military Administration permits, all the laws now in force in the Commonwealth, as well as executive and judicial institutions, shall continue to be effective for the time being as in the past," and " all public officials shall remain in their present posts and carry on faithfully their duties as before."[1]

On January 23, 1942, a so-called civil government was organized under the title " Philippine Executive Commission," by order of the Japanese Commander-in-Chief. The Chairman of the Commission was instructed immediately to coordinate the existing central administrative organs and the courts, with the approval of said Commander-in-Chief who was to exercise jurisdiction over the courts.[2]

The Chairman of the Executive Commission thereupon ordered that all courts of the Commonwealth be continued with their same jurisdiction in conformity with the instructions given to him by the Japanese Commander-in-Chief.[3] The Order provided that " activities of the administrative organs and judicial courts in the Philippines shall be based upon existing statutes, orders, ordinances and customs . . ."

On October 14, 1943, the so-called " Republic of the Philippines " was

[1] *Official Journal of the Japanese Military Administration,* Vol. 1, 2nd Ed., p. 1.
[2] *Official Journal, Japanese Military Administration,* Vol. 1, 2nd Ed., p. 7.
[3] Order No. 3, Commander-in-Chief, Japanese Forces in the Philippines, *Official Journal, Japanese Military Administration,* Vol. 1, 2nd Ed., p. 34.

inaugurated under Japanese sponsorship, but no substantial change was effected thereby.

On October 23, 1944, a few days after the first landing in Philippine territory of the American forces of re-occupation, General Douglas MacArthur issued a proclamation to the people of the Philippines which in part declared:

> " 2. That the laws now existing on the statute books of the Commonwealth of the Philippines and the regulations promulgated pursuant thereto are in full force and effect and legally binding upon the people in areas of the Philippines free of enemy occupation and control; and
>
> " 3. That all laws, regulations and processes of any other government in the Philippines than that of said Commonwealth are null and void and without legal effect in areas of the Philippines free of enemy occupation and control." [4]

On February 27, 1945, General MacArthur, on behalf of the Government of the United States, declared " the full powers and responsibilities under the Constitution restored to the Commonwealth." [5] Later in 1945 the Philippine Supreme Court (the highest court in the Islands) was re-established and resumed its legitimate functions.

The proclamation of General MacArthur issued on October 23, 1944, was the closest approach to a nullification *uno ictu* of all the laws, decrees and orders made by or under pressure of the enemy government. Subsequently, the Philippine Supreme Court with reference thereto said: " In view of the fact that the proclamation uses the words ' processes of any other government ' and not ' judicial processes ' precisely, it is not necessary to determine whether or not General Douglas MacArthur had power to annul and set aside all judgments and proceedings of the courts during the Japanese occupation. The question to be determined is whether or not it was his intention, as representative of the President of the United States, to avoid or nullify them. If the proclaimation had, expressly or by necessary implication, declared null and void the judicial processes of any government, it would be necessary for this court to decide in the present case whether or not General Douglas MacArthur had authority to declare them null and void. But the proclamation did not so provide, undoubtedly because the author thereof was fully aware of the limitations of his powers as Commander-in-Chief of the Military Forces of Liberation or subsequent conqueror."

Occupation Governments as De Facto Governments.—The question of the validity of the acts of the Japanese or of the Japanese directed governmental agencies was first squarely presented to the Philippine Supreme Court in the case of *Co Kim Cham* v. *Valdez Tan Keh et al,*[6] late in 1945. That case involved a petition for mandamus to require the respondent judge of the trial court to continue with a civil case initiated under the regime of the so-called military occupation, and pending upon liberation.

The Philippine Supreme Court found that the Government of the Philippine Executive Commission and of the Republic of the Philippines during the occupation was of the type of a *de facto* government or government of paramount force, contemplated by s. III of the Hague Convention of 1907 under the subject " Military Authority Over Hostile Territory." " It necessarily follows," the Supreme Court stated, " that judicial acts and proceedings of the courts of justice of those governments, which are not of a political complexion, were good and valid, and, by virtue of the well-known principle of postliminy (*postliminium*) in international law, remained good and valid after the liberation or re-occupation of the Philippines . . . As courts are creatures of statutes and their existence depends upon that of the laws which create and confer upon them their juris-

[4] 41 *Philippine Official Gazette,* p. 784.

[5] Note: For data and chronology *re* occupation orders and proclamations, see *Co Kim Cham* v. *Valdez Tan Keh et al.,* 41 *Official Gazette,* 783, 784.

[6] *Co Kim Cham* v. *Valdez Tan Keh et al.,* 41 *Official Gazette,* p. 779.

diction, it is evident that such laws, not being of a political nature, are not abrogated by a change of sovereignty, and continue in force *'ex proprio vigore'* unless and until repealed by legislative Acts. A proclamation that said laws and courts are expressly continued is not necessary in order that they may continue in force." As a consequence, enabling laws or Acts providing that proceedings pending in one court be continued by or transferred to another court, are not required by a mere change of sovereignty, it concluded.

Although the question of the validity of legislative Acts was not before the court nevertheless the court said:

> " According to that well-known principle in international law, the fact that a territory which has been occupied by an enemy comes again into the power of its legitimate government or sovereignty, ' does not, except in a very few cases, wipe out the effects of acts done by an invader, which for one reason or another it is within his competence to do. Thus judicial acts done under his control, when they are not of a political complexion, administrative acts so done, to the extent that they take effect during the continuance of his control, and the various acts done during the same time by private persons under the sanction of municipal law, remain good.' "[7]

The foregoing, strictly speaking, was *obiter dicta,* but it served to establish the general rule and to forecast the trend of subsequent decisions of the courts involving the validity of legislative, executive and judicial acts during the occupation period.

Validity of Occupation Penal Statutes, Special Criminal Courts and Sentences Pronounced Thereby.—The validity of the acts of the occupation government again came before the Supreme Court in a petition for habeas corpus[8] by a person named Peralta convicted under a municipal law where a heavier penalty had been imposed under a special law by a special court created during the occupation to try summarily and punish those accused of violations of occupation laws or of martial law.

In the course of its decision in the habeas corpus case the Supreme Court of the Philippines had to pass upon (1) the validity of the special court; (2) the validity of the special law promulgated during the occupation; and (3) the legal effect of the re-occupation of the Philippines by the legitimate government.

As the so-called Republic of the Philippines was according to the Supreme Court a *de facto* government of paramount force, the questions involved could not be decided in the light of the Philippine Commonwealth Constitution, because the belligerent occupant was totally independent of Philippine constitutional limitations in the administration of the occupied territory. In holding the creation of the special court valid, the Supreme Court said: " It is well established in International Law that ' the criminal jurisdiction established by the invader in the occupied territory finds its source neither in the laws of the conquering or conquered state—it is drawn entirely from the martial law as defined in the usages of nations.' The authority thus derived can be asserted either through special tribunals, whose authority and procedure is defined in the military code of the conquering state, or through the ordinary courts and authorities of the occupied territory."

With reference to the validity of the law penalizing the act of petitioner, the Supreme Court, citing Article 43, s. III of the Hague Convention of 1907 said: " All law, by whomsoever administered, in an occupied district is marital law; and it is none the less so when applied by the civil courts in matters devoid of special interest to the occupant. The words ' martial law ' are doubtless suggestive of the power of the occupant to shape the law as he sees fit; . . . The only restrictions or limitations imposed upon the power of a belligerent occupant to

[7] 41 *Official Gazette,* p. 792, quoting Hall, International Law, 7th Ed., p. 518.
[8] *Peralta* v. *Director of Prisons,* 42 *Official Gazette,* p. 198.

alter the laws or promulgate new ones, especially the criminal law as well as the laws regarding procedure, so far as it is necessary for military purposes, that is, for his control of the territory and the safety and protection of his army, are those imposed by the Hague Regulations, the usages established by civilized nations, the laws of humanity and the requirements of public conscience. . . . The sentence rendered . . . was good and valid since it was within the admitted power or competence of the belligerent occupant to promulgate the law penalizing the crime of which petitioner was convicted."

As to the legal effect of the re-occupation and the restoration of the legitimate Government, the Supreme Court also said in the *Peralta case*: " We have already held in our recent decision in the case of *Co Kim Cham* v. *Valdez Tan Keh, supra,* that all judgments of political complexion of the courts during the Japanese regime, ceased to be valid upon the re-occupation of the Islands by virtue of the principle or right of postliminium. Applying that doctrine to the present case, the sentence which convicted the petitioner of a crime of a political complexion must be considered as having ceased to be valid *ipso facto* upon the re-occupation or liberation of the Philippines by General Douglas MacArthur."

Criminal Acts of Political Complexion.—The Supreme Court in another decision reaffirmed its opinion in the *Co Kim Cham case, supra,* and said with reference to criminal acts of a political complexion: " A punitive or penal sentence is said to be of a political complexion when it penalizes either a new act not defined in the municipal laws, or acts already penalized by the latter as a crime against the legitimate government, but taken out of the territorial law and penalized as new offences committed against the belligerent occupant, incident to a state of war and necessary for the control of the occupied territory and the protection of the army of the occupier. They are penalized for public rather than private reasons, acts which tend, directly or indirectly, to aid or favour the enemy and are directed against the welfare, safety and security of the belligerent occupant. As examples, the crimes against national security, such as treason, espionage, etc., and against public order, such as rebellion, sedition, etc., were crimes against the Commonwealth or United States Government under the Revised Penal Code, which were made crimes against the belligerent occupant." The case involved a petition for habeas corpus by one convicted during the Japanese occupation of the crime of illegal discharge of firearms with less serious physical injuries. The crime was held to be of no political character, the same having been committed against the municipal laws of the Philippines. The conviction was, therefore, upheld.[9]

In another criminal case[10] the Supreme Court upheld the view that a person convicted of stealing from the Japanese Army during the occupation was liable for the continued service of his sentence even after the arrival of the re-occupation forces, the conviction being of a non-political complexion due to the absence of evidence establishing the fact that the offence had been committed in pursuance of the resistance movement. " Criminal activities," the Supreme Court went on to say, " in opposition to the forces and agents of the Japanese Empire are punishable under the laws of the Philippines although the authors thereof may apply for the benefit of the amnesty proclamation."

The principles laid down in the first three cases have been applied in at least thirteen subsequent decisions of the Supreme Court.

In one of these subsequent cases the Supreme Court pointed out that the rule of the validity of judicial proceedings during the Japanese occupation " does not necessarily exclude an exception to judicial proceedings held actually under duress or intimidation."[11]

[9] *Alcantara* v. *Director of Prisons,* 42 *Official Gazette,* p. 482.
[10] *Indac* v. *Director of Prisons, GR*-No. 113, November 29, 1946.
[11] *Asican* v. *Quirino,* 42 *Official Gazette,* p. 1502.

In a case involving the violation by certain guerrilla officers during the occupation of the Articles of War of the Philippine Army the accused pleaded their suspension. To this the Supreme Court said: "The rule that laws of a political nature or affecting political relations are considered superseded or in abeyance during the military occupation is intended for the governing of the civil inhabitants of the occupied territory. It is not intended for and does not bind the enemies in arms." The conviction was, therefore, upheld.[12]

During the occupation a new and "liberalized" Divorce Law was promulgated. After the return of General MacArthur's forces it was held no longer effective under his Proclamation of October 23, 1944, and the doctrine of the *Peralta case*.[13]

Validity of Occupation Period Private Contracts.—No case has as yet been promulgated by the Supreme Court squarely passing on the validity or invalidity of contracts and other legal transactions voluntarily entered into and performed during, but not connected with the occupation. The question has not been directly raised, probably because general opinion and sentiment concede the validity of said transactions. Contracts of this nature have, however, been enforced, thus impliedly confirming their validity.[14] It is to be observed, moreover, that in the *Co Kim Cham case, supra,* the Supreme Court quoted Hall (Hall, International Law, 7th ed., p. 518) with approval: ". . . that various acts done during the same time by private persons under the sanction of municipal law, remain good."[15] Having recognized the validity of all non-political acts of the occupation government, it would seem to follow and with more reason, that contracts and other legal transactions not of a political complexion, between private parties, would be held valid.[16] Duress would of course render them invalid.

Discharge of Pre-war Obligations in War Notes.—The greatest difficulty with reference to private contracts has arisen in connection with payments in depreciated occupation currency. On January 3, 1942, by a proclamation issued by the Commander-in-Chief of the Japanese forces,[17] occupation war notes issued by the Japanese government were made legal tender. When the Japanese were driven out these notes became worthless. The first measure bearing on this matter taken by the Commonwealth Government after the liberation of the Philippines was a declaration of a general moratorium of all debts and monetary obligations contracted subsequent to the outbreak of the war.[18] The provisions of the moratorium were later made to cover all debts and monetary obligations whether entered into before or after the commencement of hostilities, and until the country had been freed from enemy occupation.[19] The moratorium has not yet been lifted.

Banking Institutions and Occupation Period Deposits and Withdrawals.—The promulgation of certain rules or regulations governing transactions of banking institutions during the Japanese occupation was found necessary shortly after the liberation. Executive Order No. 49 was promulgated by the President of the

[12] *Ruffy* v. *The Chief of Staff,* Philippine Army, 43 *Official Gazette,* p. 855.

[13] *Baptista* v. *Castañeda,* 42 *Official Gazette,* p. 186, promulgated April 6, 1946; rule followed by Court of Appeals in *Nisperos* v. *Martinez, CA-GR* 291, and *Velasco* v. *Montemayor, CA-GR* 857.

[14] *Colmenar* v. *Cosca,* Supreme Court, *GR-L-345*; *Rodriguez* v. *Flores, CA-GR-L-609*; *Icasiano* v. *Lavidez, CA-GR* 389.

[15] *Co Kim Cham* v. *Valdez Tan Keh, supra.*

[16] A Manila Court of First Instance in the case of *Insular Life Assurance Co.* v. *Jao de Yu and Valdivia,* Civil Case No. 58, declared as binding in the absence of fraud, etc., loans entered into between private parties during the occupation, the debtors receiving occupation currency with the agreement to repay the creditors after the liberation in regular Philippine currency. In the case cited, a P.37,500 loan in war notes was secured by a conditional assignment of a life insurance policy worth P.1,500 collectible after the war.

[17] Vol. I, *Official Journal, Japanese Military Administration,* p. 38.

[18] Executive Order No. 25, November 18, 1944, 41 *Official Gazette,* p. 51.

[19] Executive Order No. 32, March 10, 1945, 41 *Official Gazette,* p. 56.

Philippines on June 6, 1945, which provided for the validation of all withdrawals and the invalidation of all deposits by depositors during the occupation, the banking institutions concerned to be liable in post-war currency only for the " lowest minimum balance remaining out of the balance in favour of the depositor on the last day prior to enemy occupation and without interest beyond December 31, 1941."[20] The validity of this Executive Order was challenged in an action for declaratory relief,[21] as a result of which the trial court held that it was " unconstitutional and void so far as it limits the liability of the banks to the so-called lowest minimum balance reached by the account during the enemy occupation " as an unreasonable and improper exercise of the police power of the State and an unjustified invasion of the rights of individuals guaranteed by the supreme law of the land. The case is now pending decision in the Supreme Court.

Insurance Companies and Occupation Currency.—The question of the validity of Executive Order No. 49 is of great import to the local insurance companies that operated during the war, as all the money received by them was of necessity deposited with local banks and this occupation currency became worthless with the return of the liberating forces. On May 20, 1946, locally incorporated insurance companies that had operated during the war were ordered by the Insurance Commissioner to suspend all activities with respect to occupation policies, and on June 5, 1946, the same companies were " given more detailed instructions "[22] which provided for possible future readjustment of amounts paid in occupation currency. The insurance companies have adopted the position of admitting liability only to the extent of the valuation given to their war-time deposits. As by Executive Order No. 49, *supra,* all occupation deposits were declared null and void the insurance companies disclaim liability. Although many suits have been filed involving this question, no case has as yet been decided by the Supreme Court or by the Court of Appeals on the validity of such payments made in depreciated occupation currency.

With the end in view of resolving by legislative fiat the question of discharge of pre-war obligations in occupation currency, the Commonwealth Government made a study of the value of Japanese war notes at different periods during the Japanese occupation as compared with the value of pre-war Philippine currency.[23] The result of these studies commonly known as the Ballantyne schedule has not been embodied in any subsequent legislation, although on grounds of equity, it has been used in a few decisions of Manila courts,[24] and among certain people desiring amicably to settle their differences.

Attempted Legislation on Validity of Transactions in Fiat Currency.—On January 18, 1946, the Congress of the Philippines passed a Bill providing for: the validation of payments during the Japanese occupation; the liquidation of unpaid balances in accordance with the value of Japanese notes at the time the obligation was incurred; the non-collectibility of occupation period deposits, and validating pre-occupation balances. During hearings on the Bill vigorous opposition arose in many quarters on the ground that the questions resolved in the manner outlined above were sufficiently provided for by existing statutes on contracts and obligations, that questions of fact arising in each particular case necessarily had to be taken into consideration, and that the problems presented called for a judicial, not a legislative, solution. The Bill nevertheless was approved and signed. The United States High Commissioner then presented it

[20] S. 2, Executive Order No. 49, 41 *Official Gazette,* p. 199.

[21] *Vicente Hilado* v. *Felix de la Costa,* Civil Case No. 10421, promulgated October 7, 1945.

[22] Regulations affecting receipts issued by the Insurance Commissioner of the Philippines, June 5, 1946.

[23] Report of D. L. Ballantyne, Special Bank Adviser to the President, June 16, 1945.

[24] *La Previsora Filipina* v. *Conchita Juachon,* 11 *Lawyers' Journal,* p. 603; *Borlongan* v. *Pascual, CA-GR* No. 131-R, July 12, 1947.

to the President of the United States recommending disapproval. It was disapproved by him on April 1, 1946.

The Philippines became independent on July 4, 1946. Measures have been taken by certain legislators, following the inauguration of the Philippine Republic, to present the same Bill with slight modifications. Special hearings have been held before congressional committees, with the same objections presented as before. No further action has been taken.

In a case decided by the Court of Appeals, payment during occupation in occupation currency of a pre-war obligation was held valid as having been voluntarily received. The obligation involved a mortgage of real property, the mortgage having been entered into before the outbreak of the war. Payment in fiat currency during the occupation was held to constitute a full discharge of the obligation, the creditor-mortgagee having demanded payment during the occupation by the institution of foreclosure proceedings, indicative of his willingness to be paid in occupation currency. Further proof of the creditor's voluntary acceptance of payment in said currency was the fact that both parties during the occupation filed a voluntary petition, subsequent to the payment, asking for the dismissal of an appeal involving the foreclosure, on the ground that they had reached an amicable agreement. The court's judgment is based on the voluntary acceptance by the creditor.[25]

Japanese Ordered Liquidation of Pre-war Obligations Due Banks of "Enemy" Countries.— Another important question has arisen as a result of the liquidation by the Japanese Military Administration of local branches of foreign banks, and foreign controlled local banks. On August 1, 1942, the Japanese Military Administration decreed the liquidation of three banks of domestic incorporation with stock control in the hands of non-Filipino citizens and four branches of foreign banks licensed to do business in the Philippines. Pursuant to the liquidation ordinance, the Bank of Taiwan, the designated liquidator, required the debtors of the seven banks under liquidation to pay their indebtedness regardless of the terms or dates of maturity. Over P34,000,000.00 representing pre-war credits in favour of the aforementioned banks was thus paid to the liquidator in occupation currency. At the same time the liquidator paid off part of the pre-war deposits to depositors (principally Filipinos). The question now is whether or not payments to the Japanese liquidator bank, the Bank of Taiwan, legally and effectively discharged the debts. Many millions of pesos are involved.

The question was first presented in an action[26] to compel the China Banking Corporation to deliver a document cancelling a mortgage given by plaintiff to defendant as security for a pre-war overdraft account which the debtor had paid during the occupation to the Bank of Taiwan, as liquidator. The defendant bank on the other hand, maintained that payment made to the Japanese liquidator was null and void as the acts of the Japanese were in violation of International Law, constituting an unlawful seizure of private property; that the liquidator was an unauthorized agent under the provisions of the Civil Code; that the bank derived no advantage from the payment and consequently plaintiff should be required to pay the amount of the outstanding balance as it stood prior to the occupation, with interest until paid. The Court of First Instance, citing Articles 46 and 53 of the Hague Convention of 1907 to which Japan was a signatory, classified the acts of the Bank of Taiwan as constituting unlawful confiscation of private property, and citing the provisions of the Civil Code[27] held that previous authorization by creditor banks was necessary in order that the act of

[25] *Sixto Carlos* v. *Fidelity and Surety Company of the Philippines, CA-GR* No. 18-R, May 15, 1947.

[26] *Haw Pia* v. *China Banking Corporation and the Bank of Taiwan, Ltd.*, Civil Case No. 71164, Court of First Instance of Manila, Buenaventura Ocampo, Judge.

[27] Article 1162 of the Civil Code provides: "Payment must be made to the person in whose favour the obligation has been constituted, or to another authorized to receive it in his name."

collection by the liquidator would operate to discharge the debtor. Judgment was entered for defendant bank and plaintiff was ordered to pay it the full amount of the indebtedness with interest within 90 days after the lifting of the moratorium. The case is now in the Supreme Court pending decision. A number of attorneys have, with the consent of the Court, filed briefs as *amici curiæ*.[28]

Another case[29] of paramount importance to the business community is also pending in the Supreme Court. This case involves the following facts: Prior to the war a British bank had granted extensive credit facilities secured by a mortgage on a large Manila office building. During the occupation the mortgage debtor paid off the loan to the Japanese liquidator and obtained a cancellation of the mortgage which was filed in the property registry. After liberation the bank sued to annul the cancellation and to re-establish the lien of its mortgage, asking for a decree of foreclosure when the moratorium was lifted. The trial court, after an exhaustive analysis of the situation brought about by the war and the Japanese occupation, held the cancellation to be a nullity. The debtor has appealed to the Supreme Court where the case is now pending decision.

A number of other questions involving local banks that had been placed under the control of the Japanese liquidator bank have also been resolved by the Manila Court of First Instance. In another decision,[30] an "enemy" (American) depositor in a bank of Philippine capitalization who had a pre-war current account which was untouched by him during the whole period of Japanese occupation was declared entitled to the full amount, notwithstanding the fact the bank had delivered the full amount of all "deposit accounts of hostile people" to the Japanese liquidator. The seizure by the Japanese liquidator of deposits of "enemy" nationals was held to be a mere act of plunder not sanctioned by international law.[31] The Court also invited the bank, as the real injured party, to look to the Bank of Taiwan or the Japanese government for reimbursement.

In still another decision of the Manila Court of First Instance,[32] payment by a debtor during the occupation, of a pre-war obligation to a Manila bank was held to be a full discharge of said obligation in view of the acts of the bank in having demanded payment. The claim of the bank that the demands had been made by it due to the close supervision amounting to duress of the Japanese Military Administration was regarded as untenable. The Court found that the supervision

Extensions of Periods Granted Due to Enemy Occupation.—Due to the suspension of normal activities during the occupation, the Congress of the Philippines passed an Act[33] providing for an extension of time, roughly equivalent to the period or duration of the Japanese occupation within which any term, condition or stipulation pertaining to public land, forest and mineral concessions might be performed. The extension of the term of any public land, forest or mining concession, in force on January 1, 1942, was also authorized by the same Act, the extension being equal to the period from January 1, 1942, the approximate date of the Japanese entry into Manila, to the date of the approval of the Act.

A rule has also been enunciated by the Supreme Court that pre-war public officers are not entitled to continue in office beyond the terms for which they had previously been elected, even though they had not discharged the duties of their

[28] Since the foregoing was written, the Supreme Court of the Philippines, by a divided court, reversed the decision of the Trial Court and held valid the payment to the Bank of Taiwan. A subsequent petition for reconsideration was denied by the Supreme Court on September 21, 1948.

[29] *Hongkong & Shanghai Banking Corporation* v. *Luis Perez Samanillo Inc. et al.*, Civil Case No. 71009 (Court of First Instance).

[30] *Milne* v. *Philippine National Bank*, Civil Case No. 71200, Court of First Instance of Manila, Fernando Jugo, Judge, promulgated February 4, 1946.

[31] Articles 46, 47 and 53 of s. III of the Hague Convention of 1907.

[32] *Araneta* v. *Philippine Trust Company*, Civil Case 1204, Court of First Instance of Manila, Filipe Natividad, Judge, promulgated September 27, 1947.

[33] Commonwealth Act 720, approved November 1, 1945, 41 *Official Gazette*, p. 1077.

was not sufficiently strict as to constitute legal duress. This case differs from the cases alluded to in the two paragraphs immediately preceding in that the element of an unauthorized liquidator bank did not enter the picture.

office during the Japanese occupation. The Supreme Court distinguishing "tenure" from "term" stated: "There is no principle, law or doctrine by which the term of an officer may be extended by reason of war."[34]

With reference to private contracts, other than the extension necessarily granted by the moratorium pursuant to which the enforcement of payment of all pre-liberation debts has been suspended,[35] no other legislative measures have been passed. By a decision of the Court of Appeals, a lease contract was held to be, in accordance with existing statutory provisions on leases, inextendible beyond the term agreed upon by the parties, as against the claim of the lessee that having been deprived of the possession of the premises by the Japanese forces, he had a right to an extension of the term of the lease equal to the duration of said deprivation.[36] This case is now on appeal to the Supreme Court.

Ownership of Private Property as Affected by Occupation.—In addition to the holding in the *Co Kim Cham case, supra,* that the powers of the Japanese invaders of the Philippines were regulated by the Hague Convention providing that "private property must be respected, that pillage is formally forbidden and that an army of occupation can only take possession of cash, funds and realizable securities and other movable property belonging to the occupied State," the declaration of January 5, 1943, regarding forced transfer of property in enemy controlled territory signed by all the Allied Governments and the French National Committee[37] and adhered to by the Philippine Commonwealth Government in exile, has been cited in numerous instances in support of the nullification of transfers of property unlawfully confiscated by the Japanese Government. All private property seized or taken by the Japanese through force or duress and subsequently located and identified has been or is in process of being reinstated. Considerable property has been located in Japan itself. The Supreme Court held in cases involving the commandeering of private cars by the Japanese that such acts of requisition by the invading army did not affect the title of the real owner.[38]

By the provisions of Public Law No. 91, 65th United States Congress, October 6, 1917,[39] popularly known as the "Trading With the Enemy Act," properties, goods and securities located in the Philippines belonging to the Axis powers, Axis nationals and entities were to be transferred to or vested in the Office of the Alien Property Custodian in the Philippines. By the Philippine Property Act of 1946,[40] all property in the Philippines vested in the Alien Property Custodian and the proceeds from its sale were to be transferred to the Republic of the Philippines. By the same statute the Alien Property Custodian was made subject to the jurisdiction of the Philippine Courts in the event of disagreement with claimants of property in the hands of the Custodian.

Finally.—The law, as it now exists by virtue of judicial pronouncements and post-war legislation to date, may be summarized as follows:

1. The Philippine Executive Commission and the so-called Republic of the Philippines (both created by the Japanese military administration) were governments of paramount force established by the invaders, and were *de facto* governments.

[34] *Geukeko* v. *Santos, GR* No. L-128, March 2, 1946.

[35] "The debt moratorium only provides for the temporary suspension pending action by the government of the enforcement of payment of certain debts, but this Executive Order does not leave without force and effect the provisions of the Civil Code concerning the satisfaction of interests in cases of defaulted payments." (*Borromeo* v. *Ibanez de Sabido, CA-GR* No. 40.)

[36] *Roman Catholic Archbishop of Manila* v. *Lo Ching et al., CA-GR* No. 102 (L-415).

[37] *U.S. Department of State Bulletin,* Vol. VIII, No. 185, p. 121.

[38] *Saavedra* v. *Pecson, GR* No. L-260; *Enriquez* v. *Manuel,* L-172, 43 *Official Gazette,* 104, April 25, 1946.

[39] C-106 40 *Stat.* 411.

[40] Act of U.S. Congress of July 3, 1946, Title 48 USCA S. 1276a.

2. The validity of the Acts of said governments are to be tested exclusively by the laws of war as laid down in the Hague Regulations, by international usage and the requirements of public conscience, and confirmed by the writings of publicists and by judicial decisions, the laws of war being the only legal basis and source of authority of the invader in the establishment of such governments.

3. Under the laws of war the military occupant cannot alter the municipal laws, unless absolutely necessary, but can modify, substitute, or abrogate them when necessary for his protection in the unhindered prosecution of the war, the principal object of the occupant being to provide for the security of its forces and to promote the success of its operations.

4. In passing upon the validity of the Acts of the enemy occupant, no distinction is made between legislative, executive or judicial Acts of the *de facto* governments, the criterion of validity being the nature or character of the Acts which from such standpoint may be classified as follows:

(*a*) Acts of *de facto* governments which under the laws of war have been executed contrary to express prohibition, in excess of the occupant's authority or pursuant to an unlawful alteration of the municipal laws of the occupied territories. Said Acts are void *ab initio*.

(*b*) Acts of *de facto* governments which are executed pursuant to the necessity of protecting the occupant or for the successful prosecution of the war. Such Acts are valid during the period of the occupation but are invalidated by the re-occupation of the territory by the legitimate government.

(*c*) Acts of *de facto* governments which are executed pursuant to the municipal laws not altered in any way by the occupant. These Acts, not being of a political complexion, are valid and legal even after the return of the legitimate government.

5. The Commander-in-Chief of the liberating or re-occupying forces of the legitimate government could not have invalidated Acts which under the laws of war were validly executed by the occupant, since his powers are derived from the law of nations directly or indirectly, or from the municipal laws of his government of which the law of nations is a part. The proclamation of General Douglas MacArthur of October 23, 1944, nullifying all Acts of the governments in the Philippines other than those of the Commonwealth Government are to be deemed to have referred to, and to have confirmed the invalidity of, those Acts of the occupying government which were void *ab initio* or which were valid only during the Japanese occupation.

6. The restored sovereign undoubtedly has the power to abrogate prospectively the lawful executive and legislative Acts of the occupant government.

7. Courts of the re-occupying power may take cognizance of cases not of a political complexion pending in the courts of the occupation government at the time of the re-occupation of the country, an enabling Act not being necessary.

8. The creation of a special court by the occupation government, and the summary procedure set up for said court were valid as authorized by martial law. No question may arise as to whether or not a court is of a political complexion, for it is a mere governmental agency charged with applying the law to cases falling within its jurisdiction. Its judgments or sentences may be of a political complexion or not depending upon the nature and character of the law so applied. But not the court itself.

9. The temporary alteration of the municipal law, especially the criminal law, by the invaders, for the purposes of promoting the success of their military operations is valid as authorized by martial law. Punitive sentences as a result of such alteration, or penal sentences of a political complexion, however, cease to be valid from the time of the re-occupation by the legitimate power. No reparations, however, are legally due for what has been carried out.

10. The " New Divorce Law " promulgated by the occupation government was declared to have had no force and effect from the time of General MacArthur's

Proclamation, *supra,* issued upon the landing of the liberation forces in Philippine territory.

11. Private contracts and other legal transactions not connected with the occupation, being acts of a non-political complexion governed by municipal laws, are valid and remain so after re-occupation.

12. Present holders of goods and securities stolen or unlawfully confiscated by the enemy in violation of the Hague Convention are not regarded as possessing title thereto.

13. Holders of public land, forest and mineral concessions owned by the State have been granted extensions of time within which to comply with government requirements imposed in connection with said concessions. The period of enemy occupation has been deducted from the running of the term originally specified in said concessions.

14. No extensions other than the moratorium law, *supra,* with reference to the time of performance of private contractual obligations have been granted, it having been expressly decided by the courts that conventional terms in lease contracts were not extended. Terms of pre-war elective public officers are inextendible by reason of deprivations of office caused by war.

15. The discharge of pre-occupation obligations in occupation currency is valid when payment has been solicited and voluntarily received by the creditor.

16. The rule with reference to discharge of pre-occupation obligations in depreciated occupation currency when unsolicited, unauthorized or involuntary on the part of the creditor is still unsettled, due in part to the present moratorium law in force affecting all monetary obligations entered into prior to the liberation of the Philippines and in part to the pendency of pertinent cases on appeal to the Philippine Supreme Court.

ENEMY LEGISLATION AND JUDGMENTS IN LIBERATED GREECE

[*By* Pan J. Zepos, *LL.D.* (Athens), *Professor of Civil Law at the University of Thessaloniki.*]

Greece was occupied by the German troops in April, 1941. Italian troops arrived later, while Bulgarian troops occupied Eastern Macedonia and Thrace in April, 1941, at the invitation of the Germans and as a reward for their alliance with the Nazis. The King and the Greek Government took refuge first in Crete and then in Egypt in April, 1941; at the same time the enemy forces of occupation established a Greek " Government " in Athens.

Greece suffered enemy occupation until October, 1944, when British troops together with the Greek Army liberated the whole country. The legacy of this occupation has been a bitter one, and in legal matters very complicated and intricate. The triple enemy occupation and the functioning of a " government " enforced by the enemy created one problem after another, both during the enemy occupation and after the liberation of the country, as shown in the following summary.

I.—Period of Enemy Occupation (1941–1944).

1. The Greek " governments," which were successively established by the enemy forces of occupation in Athens, stated in the messages which they addressed to the Greek people that their power was derived " from the Greek people and from the Greek Military forces," while at the same time they admitted that they came into being " with the consent of the forces of occupation."

These so-called " governments " promulgated decrees, laws, and even Constitutional Acts regulating a great number of legal relations which not only were indispensable in order to keep alive the administration of justice in Greece during the occupation, but also affected the whole legal life of the country. Thus, Constitutional Acts, laws and decrees were enacted relating to various

matters, e.g., alterations in the form of the Constitution, the nomination of a new head of the Executive, the establishment of new Tribunals, the introduction of new laws, the foundation of new Faculties in the Universities, and of a new State Orchestra; and new regulations concerning the promotion of military officers.

All these dispositions frequently resulted in essential alterations of Greek legal life, notwithstanding the fact that they were not indispensable for the purpose of maintaining public order and the interests of the non-belligerent population, or even for the security of the military forces of occupation or for the achievement of military operations according to the Rules of War as laid down in the Regulations annexed to the Fourth Hague Convention as revised in 1907, Art. 42 *et seq.*[1]

2. This excessive legislative output of the so-called Greek " governments " of the occupation period was put under the control and made subject to the interpretation of the Greek Tribunals even during the occupation. Plaintiffs or defendants did not hesitate to dispute the validity of these provisions in supporting their cases before the Greek Tribunals. But, speaking generally, it can be said that the Greek Tribunals, swayed by their desire that no disturbance or irregularity should arise in the legal life of the country during these unhappy times, inclined to the view that these so-called Greek " governments " had the power to legislate as they did, and that their decrees, laws, and Constitutional Acts were valid and obligatory.

This mistaken conception was admitted by the highest administrative Court, the Conseil d'Etat, and by the highest civil Court, the Areopagus.

The Conseil d'Etat in its decision No. 97 of 1942 dealing with the administration of the property of a juristic person in which the " Minister " of Public Assistance had appointed new administrators, accepted by a small majority (6 judges against 5) the proposition that the Greek " government " nominated by the military forces of occupation was a government *de facto* with full legislative competence and power of enacting laws even of constitutional character. The Conseil d'Etat reiterated this opinion in subsequent decisions, e.g., in its decisions No. 132 and No. 353 of 1942, and No. 24 of 1943. And later the Areopagus formulated the same idea in its decision No. 68 of 1944, in which the highest civil Court declared that the Greek " governments " nominated by the military forces of occupation assumed power in the absence of any opposition, so that they were necessarily able to enact decrees, laws and Constitutional Acts until the Constitution resumed its regular operation. Thus, according to this decision of the Areopagus, all the Acts promulgated by these " governments " were valid and obligatory as laws or Acts of the Greek State, provided they were promulgated according to the requirements of the legislation then in force.[2]

3. This opinion laid down by the Greek Tribunals was strongly criticized by Greek jurists both during the occupation and after.[3]

Thus, it was rightly pointed out, that the Greek " governments " imposed by the enemy during the military occupation were not " legal " in the technical sense of the term, because they had not assumed their power according to the

[1] The legislation of the period of the occupation is to be found in the official *Government Gazette* of the years 1941–1944.

[2] The decision of the Conseil d'Etat No. 97 of 1942 is to be found in the periodical *Themis* (1945), p. 41. The decision of the Areopagus No. 68 of 1944 is to be found in *Themis* (1944), p. 121.

[3] See the following books or contributions published in Greek: *Pesmazoglou*. The legal position of the Greek Government imposed during the occupation. Athens (1942). *Massouridis*. The legal order during and after the military occupation (1945). *Tenekidis*. Occupatio Bellica, etc. (1945), and article in *Revue Generale de Droit International Public* (1947), p. 113 *et seq*. *Maridakis*, The enforcement of foreign judgments (1946), p. 28 *et seq*. *Pratsicas*, in *Themis* (1944), p. 121. *Fragistas* in *Harmenopoulos* (1948), p. 49 *et seq*.

procedure required by the Greek Constitution, i.e., they were not nominated by the King nor had they the confidence of Parliament. Further, it was rightly pointed out, that such " governments " were not even governments *de facto*, because the conception of a government *de facto* is incompatible with the idea of a government imposed by the enemy military forces of occupation.

Indeed, the very nature and character of an *occupatio bellica* excludes the possibility of a government *de facto*. The latter in principle derives its competence from its own power and force and cannot derive these from an external source, i.e., the power of military forces of occupation.[4] Hence, as the Greek " governments " of the period of occupation derived their authority from and were imposed by the enemy and did not arise from any revolution, sedition or civil war, these " governments " were subject to the legal system which governed the military occupation from which they were derived, i.e., they were subject to the regulations of International Law relating to *occupatio bellica*. These " governments " were not sovereign in the technical sense of this term. They were simply an extension of the power of the enemy military force in occupation of the country, and so were subject to the Rules of War as laid down in the Regulations annexed to the Fourth Hague Convention as revised in 1907, Art. 42 *et seq*.

This is the only possible legal ground for the authority of the " governments " imposed by the enemy during the occupation. Otherwise, in order to accept the " Greek " character of these governments we should have to admit the possibility of two Greek governments existing simultaneously during the occupation, representing and binding the same Greek State, i.e., one government in Athens and a second one in Cairo or elsewhere abroad, which would be an absurd situation. And as the following exposition shows, the solution outlined above was the only possible and equitable explanation of the legal position of the " governments " of the occupation period, as was shown also by the Greek legislation which immediately followed the liberation of the country in 1944.

II. Period After the Liberation (1944—).

1. A long enemy occupation necessarily causes complications in legal relations, the removal of which cannot take place automatically upon the liberation. On the other hand, the principle of the " perenniality," continuity of the State requires that laws, Acts or decrees, which owe their existence to natural and normal social life of the nation, should remain valid and obligatory, for the simple reason that notwithstanding the enemy occupation the social and the legal life of the occupied country is not brought to a stop. Lastly, from the idea that, by maintaining the rules of International Law relating to *occupatio bellica*, not only the interests of the enemy are served (e.g., security of its military forces, etc.) but also the interests of the occupied country (e.g., security, respect of private property, etc.), it follows that laws, Acts or decrees, enacted within the scope and the exigencies of *occupatio bellica* and in accordance with the rules of the International Law of War, remain valid and obligatory even after the end of the occupation and during the period which follows the liberation. This conclusion is that which now prevails in International Law, contrary to the older conception, according to which after the end of the occupation all the laws, Acts or decrees enacted during the occupation, were considered as void *ex tunc*, i.e., from the time of their promulgation.[5]

Following the above-mentioned equitable and modern conception the Greek Tribunals did not once and for all declare any law or Act or decree of the occupation period to be void, in those cases in which they were required to

[4] See *Spiropoulos*, Die de facto Regierung in Völkerrecht, 1926.

[5] See *Westlake* Traité de Droit International (French edition by De Lapradelle, 1924), p. 489 *et seq*.

pronounce on the validity of such laws, Acts or decrees. On the contrary, the Greek Tribunals decided that such laws, Acts or decrees retained their validity in so far as they were enacted within the scope and exigencies of *occupatio bellica,* and according to the International Law of War.

Thus, for example, the Court of Appeal of Thrace decided in its judgment No. 21 of 1947 that contracts made before a Bulgarian functionary after the expulsion or flight of the Greek public notaries from Thrace during the occupation by Bulgarian troops were valid and binding on the contracting parties even after the liberation of Thrace;[6] and this solution is in conformity with the tenets of the International Law of War, provided these contracts were made freely and without any pressure on the part of the enemy forces or civil authorities. It has been, however, rightly pointed out that judgments of the Bulgarian Tribunals installed by the enemy in Eastern Macedonia and Thrace, after the expulsion of the Greek civil authorities, can be executed only after their adoption by the Greek Tribunals on the same lines as all foreign judgments are enforced according to the dispositions of the Greek civil procedure now in force.[7]

Thus, in general, all kinds of laws, statutory instruments or decrees enacted during the occupation within the exigencies of the *occupatio bellica* or in the interests of the population of the occupied country remain valid even after the liberation, until their amendment or repeal by a new enactment. On the contrary, laws, statutory instruments or decrees enacted during the occupation either by the enemy himself or by the " governments " imposed by him in excess of jurisdiction and beyond the scope and exigencies of the *occupatio bellica* as regulated by International Law, are considered as void *ex tunc,* according to the old rule " quod nullum est, nullum producit effectum." The decision on the validity or invalidity of such enactments must remain in principle in the hands of the Greek Tribunals, which have to decide in each case brought before them. The Greek Legislature, however, may regulate in general terms the fate of such enactments; and indeed, the Greek Legislature did deal with this problem as explained hereafter.

2. The problem relating to the validity of enactments of the occupation period was faced by the Greek Legislature immediately after the liberation. Thus: (*a*) Constitutional Act No. 4 promulgated on December 2, 1944, provided that legal Acts of constitutional character enacted during the occupation may be annulled or abolished or amended even *ex tunc,* i.e., from the time of their promulgation, by laws enacted on the proposal of the Cabinet.[8] And some special Constitutional Acts promulgated after the liberation of the country did in fact annul at once and *ex tunc* laws or administrative Acts of the period of the occupation, e.g., Constitutional Act No. 9 of January 25, 1945, which annulled the Acts of the occupation period relating to the personnel of the Air Force, Constitutional Act No. 22 of February 24, 1945, which annulled the Acts relating to the competence of the Ministry of Foreign Affairs, Constitutional Act No. 32 of March 29, 1945, which annulled the Acts relating to the competence of the Ministry of War, Constitutional Act No. 34 of March 27, 1947, which abolished the new University Faculties founded during the occupation, Constitutional Act No. 48 of June 4, 1945, which annulled the Act concerning Port Officers, Constitutional Act No. 94 of January 15, 1946, which annulled several Acts concern-

[6] See the decision of the Court of Appeal of Thrace No. 21 of 1947 in the *Journal of Greek Lawyers,* 1947, p. 277 *et seq.* For a contrary solution admitting the invalidity of such contracts, see the decision of the Court of Rodopi No. 111 of 1947 in the same *Journal* (1947), p. 551 *et seq.*

[7] See *Maridakis,* The enforcement of foreign judgments (1946), p. 28 *et seq.* *Fragistas* in *Harmenopoulos* 1948, p. 106 *et seq.* (Both in Greek.)

[8] Constitutional Act No. 4 of 1944 has been rightly criticized because according to its dispositions the Acts of the period of occupation seem to be considered as valid until their annulment by a posterior law, irrespective of whether they were enacted according or contrary to the rules developed by International Law of War to govern *occupatio bellica.* See e.g. *Massouridis,* op. cit., p. 53 *et seq.*

ing air transport, etc. (*b*) On the other hand, Constitutional Act No. 100 of February 8, 1946, declared valid the laws or Acts promulgated by the legal Greek Government in exile between 1941 and 1944, and Constitutional Acts No. 62 of 1945 and No. 99 of 1946, also declared valid some laws or administrative Acts promulgated by the Greek Government in exile and concerning special topics, e.g., the organization of the Greek Army, etc. (*c*) Constitutional Act No. 21 of February 24, 1945 (Art. 9), is of very great importance, for it authorized the Minister of Justice to constitute a committee to consider and liquidate the legislation of the occupation period. Such a committee was constituted by the Minister of Justice,[9] and submitted a draft which became Constitutional Act No. 58 of June 26, 1945.

According to this Act and its subsequent amendments,[10] the laws or Constitutional Acts promulgated during the period of the enemy occupation by the so-called " governments " imposed by the enemy are deemed to be void since their promulgation, provided that their nullity has been declared by a decision of the Greek Cabinet published in the official *Government Gazette*. Act No. 58 determined further that all the Administrative Acts, promulgated by virtue of a law or Constitutional Act of the occupation period annulled under Act No. 58, are also *ipso jure* and automatically void. However, there is power to attach special conditions to the annulment of judgments of the Greek Tribunals or " personal " administrative Acts, or contracts made according to the terms of such laws or Constitutional Acts. Thus, upon petition of the interested party within a limited time, judgments may be amended by the process of judicial revision, " personal " administrative Acts may be annulled by the competent Minister and contracts, too, may be set aside by the regular civil Courts.

Constitutional Act No. 58 of 1945 provided further that the Greek Cabinet may declare laws or Acts of the occupation period to have been promulgated in the interests of the Greek State, and in that case such laws or Acts are valid *ex tunc*, i.e., from the time of their promulgation. Lastly, the same Constitutional Act No. 58 contained also other dispositions regulating the validity or invalidity of laws or administrative Acts promulgated during the occupation, following the basic idea of annulling the laws or Acts of the occupation period while avoiding undue disturbance or irregularity in the whole legal life of the Greek State or its nationals.[11] And, in general, this basic idea has been followed by the Greek Legislation in regulating also the validity or invalidity of contracts made during the enemy occupation between enemy authorities and Greek or foreign nationals, as is explained in what follows.

(*d*) A special Constitutional Act No. 45 of June 1, 1945,[12] declared void in principle all contracts made during the occupation by which property in things movable or immovable was transferred by civil or military authorities of the enemy or their employees to Greek or foreign individuals or juristic persons. These became the property of the Greek State with the exception of such things as were transferred with the object of helping or serving the exigencies of the internal trade of the country, e.g., provisions, pharmaceutical products, etc. If, however, the Greek State does not seize this property within a limited time,

[9] The members of the Committee were J. Sakketas (President of the Areopagus), Professor J. Spiropoulos, Professor Pratsicas, Tazedakis, Pesmazoglou and others. In the end the Committee was limited to J. Sakketas, N. Tazedakis and M. Pesmazoglou. The reports of this Committee are very interesting.

[10] Constitutional Act No. 58 of 1945 has since been amended by Constitutional Acts No. 69 and 78 of 1945 and No. 97 and No. 115 of 1946.

[11] See the judgments relative to Constitutional Act No. 58 of 1945 of the Conseil d'Etat No. 265 of 1945 in *Themis* (1945), p. 333 *et seq.*, and of the Areopagus No. 175 and No. 191 of 1946 in *Themis* (1946), p. 241 *et seq.*, and in the *Journal of Greek Lawyers* (1946), p. 351 *et seq.*

[12] Act. No. 45 of 1945 has been further amended by Act No. 86 of 1945. See also Law No. 410 of 1945.

such contracts remain valid in order to avoid irregularities and uncertainties.[13]

(*e*) During the enemy occupation and owing to the great financial and economical difficulties, a large number of immovables were sold at a depreciated price. The social aspect of such sales did not escape the attention of the Greek Legislature after the liberation of the country. Thus, Constitutional Act No. 114 of March 29, 1946, declared void contracts for the sale of immovables made during the enemy occupation, under conditions to be regulated in detail by a special law. A draft of such a law is still under debate in Parliament. Meanwhile, however, the Greek Tribunals have admitted that until this draft becomes law, contracts for the sale of immovables made during the enemy occupation are valid.[14]

(*f*) Lastly, in order to help in mitigating the irregularities which arose in the legal life of the country during the time of the enemy occupation, the Greek Parliament declared by Resolution No. VI of July 19, 1946, that the legal Acts of the occupation period promulgated either under the title of a Constitutional Act or of a Law or of a Decree, etc., may be amended or repealed by a law promulgated under the usual procedure of legislation now in force if they remain in force according to the provisions of the Constitutional Acts above mentioned.

Thus an end has been put to the inglorious history of the enemy occupation with its inflated legislative output, and its irregular character has, at least in principle, been superseded by the Constitutional regularity of the Greek State.

ENEMY LEGISLATION AND JUDGMENTS IN FRANCE

[*By* M. Georges-René Delaume, *Docteur en droit.*]

La libération du territoire français et le rétablissement de la légalité républicaine,[1] ont soulevé un certain nombre de problèmes délicats. Pendant quatre années, les actes de Allemands et du pseudo-gouvernement de Vichy s'étaient succédés, bouleversant les institutions politiques et démocratiques du pays, son économie et sa législation. Il s'agissait, d'une part, de savoir quel devait être le sort des actes législatifs, publics et juridictionnels pris ou rendus en France par l'ennemi ou par ses séides, pendant l'occupation—il fallait, d'autre part, prévoir des mesures réparatrices des exactions et spoliations commises par les Allemands ou par leurs agents. Le législateur devait, autant qu'il était en son pouvoir, s'efforcer non seulement d'effacer les derniers vestiges de l'occupation, mais encore d'en réparer les méfaits. Sans doute était-il impossible, en présence de la multiplicité et de la diversité des cas d'espèce, de tout prévoir dans les textes légaux, mais il appartenait aux tribunaux, par voie d'interprétation, en s'inspirant non seulement de la lettre de la loi, mais encore de son esprit, d'assurer le triomphe de l'équité et de la justice. Ces efforts ont été, dans l'ensemble, couronnés de succès et la Jurisprudence a su appliquer les dispositions législatives avec toute la souplesse nécessaire. On ne peut que s'en féliciter.

Dans cette œuvre de redressement, le législateur devait d'ailleurs tenir compte de la situation particulière de certaines provinces françaises qui, plus que d'autres, avaient eu à souffrir de l'occupation. En effet, les Allemands, en violation du traité de Versailles de 1919 et des conventions d'armistice, avaient annexé au

[13] The dispositions of Act No. 45 of 1945 apply only to contracts made between enemy *authorities* and Greek or foreign private persons and not to contracts between enemy *private* presons and Greek or foreign private persons, the reason being that contracts of the first category resulted for the most part in the exploitation of the Greek national economy.

[14] See e.g. the decision of the Court of Appeal of Athens No. 64 of 1946 and No. 1035 of 1947 in the *Journal of Greek Lawyers* 1946, p. 440 *et seq.*, and 1947, p. 95 *et seq.*

[1] Ordonnance du 9 Aout 1944 (*J.O.*, 10 Aout 1944, p. 688).

Reich les trois départements du Haut-Rhin, du Bas-Rhin et de la Moselle.[2] Dans ces départements, la législation allemande s'était donc substituée à la législation française. Au contraire, dans le reste du territoire, on constatait la coexistence de deux sources de Droit parallèles: les actes des autorités d'occupation et ceux du gouvernement de fait de Vichy. Ainsi s'explique qu'on ait réservé un traitement différent aux uns et aux autres.

Tenant compte de ces distinctions indispensables, il convient donc d'étudier successivement: le sort des actes des autorités allemandes ou pris sur leur instigation—les moyens propres à réparer les dommages causés par le fait de l'occupant aux particuliers.

Si ces questions sont les plus importantes, elles ne sont pas cependant les seules et un certain nombre de problèmes particuliers méritent d'être signalés. Nous les grouperons sous la rubrique " questions diverses."

I. *Sort des actes des autorités allemandes ou pris sur leur instigation*

Deux points doivent être examinés séparément: il y a lieu de distinguer les actes législatifs ou publics et les jugements. Il est nécessaire également de séparer les actes ou les jugements rendus en France occupée et les actes ou les jugements rendus dans les départements de l'Alsace et de la Lorraine.

A. Les actes législatifs ou publics

I°. *En France* (*hormis l'Alsace et la Lorraine*).—Les lois et actes publics édictés par les Allemands, en France, n'ont fait l'objet d'aucune mesure législative française. Le Législateur ne s'est pas donné la peine de prononcer leur nullité: celle-ci résulté automatiquement de la libération du territoire.[3]

Il n'en est pas de même pour les lois et décrets du gouvernement de Vichy. L'ordonnance du 9 Aout 1944, pose en principe, dans son article 2, que sont nuls tous les actes législatifs " promulgués sur le territoire continental postérieurement au 16 Juin 1940 et jusqu'au rétablissement du Gouvernement provisoire de la République française." Mais, ce principe est trop absolu et le texte ajoute immédiatement que " cette nullité doit être expressément constatée." En effet, parmi les lois promulguées par le gouvernement de Vichy, toutes ne sont pas répréhensibles au même degré; certaines méritent même d'être conservées. Aussi s'explique-t-on les distinctions auxquelles procède le Législateur.

Tantôt certaines lois sont annulées purement et simplement. Il en est ainsi, notamment, des actes visés par l'article 3 de l'ordonnance du 9 Aout 1944. Cette disposition a pour objet: les lois et actes constitutionnels de Vichy—les actes ayant imposé à des Français le travail forcé pour le compte de l'Allemagne—les actes relatifs aux associations secrètes—ceux ayant trait à la situation des Israëlites. Il s'agit là, en un mot, de textes dont le but avoué était de porter atteinte aux principes républicains, ou qui se proposaient directement d'aider l'Allemagne dans sa lutte contre les Alliés, ou, enfin, de textes inspirés par l'idéologie raciste allemande contrairement à toutes les idées reçues en France.

[2] Cette annexion n'ayant pas été reconnue par la France, la Chambre Criminelle de la Cour de Cassation a pu décider, dans un arrêt du 24 Juillet 1946 (*J.C.P.*, 1946, IV, p. 150): " La prétendue déclaration d'annexion de l'Alsace par l'Allemagne, acte unilatéral, ne pouvant modifier les clauses du traité de Versailles de 1919, peuvent constituer des crimes de guerre les actes commis par l'ex-Gauleiter allemand dans cette province, dans ce territoire français."

Liste des Principales Abbreviations.—*C.civ.* : Code civil. *D.* : Recueil Dalloz. *D.C.* : Recueil Critique Dalloz. *Gaz. Pal.* : Gazette du Palais. *J.C.P.* : Juris-classeur périodique (Semaine juridique). *J.O.* : Journal Officiel de la République française. *S.* : Recueil Sirey.

[3] L'ordonnance du 28 Aout 1944, article 3, deduit cependant une conséquence de cette nullité, lorsqu'elle dispose: " Les lois, décrets ou réglements émanant de l'autorité ennemie, les ordres ou autorisations donnés par cette autorité our par les autorités qui en dépendent ou qui en ont dépendu, ne peuvent être invoquées comme faits justificatifs au sens de l'article 327 du Code pénal, mais seulement s'il y a lieu comme circonstances atténuantes ou comme excuses absolutoires."

Tantôt, la nullité est rétroactive. Il en est ainsi, par exemple, pour les lois visées par l'article 4 de l'ordonnance du 9 Aout 1944 et par le Tableau I annexé à cette ordonnance.

Tantôt, enfin, certaines lois sont expressément validées. Il s'agit, le plus souvent, de textes complètement étrangers à toute préoccupation politique ou rendus nécessaires par suite des circonstances et qu'un gouvernement républicain n'aurait pas désavoués. On peut citer à titre d'exemple la loi du 22 Septembre 1942 sur les effets du mariage quant aux droits et devoirs des époux (validée par une ordonnance du 9 Octobre 1945). Cette loi, en effet, n'est que l'aboutissement de travaux législatifs dont l'origine remonte à 1932 et qui avaient partiellement abouti, à la veille de la guerre, au vote de la loi du 18 Février 1938 et à l'étude du projet de réforme des régimes matrimoniaux. Dans le même esprit, signalons les lois suspendant les délais de procédure ou ceux relatifs à la prescription; ces dispositions ne font que reprendre et préciser des mesures adoptées dès l'ouverture des hostilités, par le gouvernement français de l'époque.[4]

La validation des lois de Vichy maintenues en vigueur ne soulève pas, en général, de difficultés: la loi validée est considérée comme ayant toujours été valable et continue à produire ses effets dans l'avenir.

Au contraire, le problème de l'annulation des textes promulgués par le gouvernement de fait est beaucoup plus délicat.

On comprend aisément que le Gouvernement provisoire ait voulu, dès son installation en France libérée, faire disparaître les lois odieuses de Vichy. Il y avait là un problème d'ordre politique qu'il importait de résoudre sans aucun retard. Mais on aurait pu concevoir que la technique employée par le législateur, pour parvenir à ce résultat, fût la technique hébituelle, c'est à dire l'abrogation, avec ou sans rétroactivité, de la loi ancienne. Le législateur a préféré une méthode plus radicale: la nullité. Ceci entraine d'importantes conséquences.

Des arrêts récents de la Cour de Cassation montrent tout l'intérêt qu'il y a à distinguer l'annulation de l'abrogation.

Un premier arrêt de la Chambre sociale, du 14 Février 1946,[5] met en lumière cette différence. Un tribunal avait, en 1943, jugé recevable l'action exercée par un syndicat ouvrier au nom de ses adhérents, en vertu d'une convention collective. Le demandeur au pourvoi prétendait que cette solution était inexacte, la loi du 4 Octobre 1941 (qualifiée de " Charte du Travail ") ayant retiré ce droit aux syndicats (art. 72 et 80). Le pourvoi était pendant devant la Cour de Cassation quand l'ordonnance du 9 Aout 1944 vint constater la nullité rétroactive de la loi du 4 Octobre 1941. La Chambre Sociale rejeta le pourvoi: " à raison de l'effet rétroactif attaché par le législateur à la nullité des textes sur lesquels il était fondé." Mais, comme on l'a relevé justement, l'effet rétroactif attaché à la loi nouvelle n'eût pas permis à la Cour Suprême de s'en saisir. Il est de droit positif, en effet que, quand une loi nouvelle rétroactive est promulguée pendant l'instance en Cassation, la Cour de Cassation ne peut pas, malgré la rétroactivité, en faire application (Req. 20 Janv. 1920, D.P. 1920. I. 129). On ne saurait évidemment reprocher aux magistrats du fond de n'avoir pas appliqué une loi dont ils ne pouvaient, à l'époque du jugement ou de l'arrêt, avoir connaissance. L'annulation entraîne, par conséquent, des conséquences techniques que la seule abrogation ne saurait justifier.

L'opposition entre ces deux notions est plus typique, encore, lorsque le législateur pour des motifs d'opportunité, limite la portée de l'annulation en disposant, par une clause expresse, que les effets découlant de l'application antérieure de la loi ne subiront pas d'atteinte. C'est notamment la solution

[4] Voir les textes relatifs aux délais de procédure validés par l'ordonnance du 30 Décembre 1944 (*J.O.*, 31 Décembre 1944, p. 2144). La même ordonnance valide également les textes relatifs à la suspension des délais en matière de propriété industrielle et de propriété littéraire et artistique,—d'inscription hypothécaire,—de nationalité,—de recouvrement des créances de l'Etat.

[5] D.46, 328.—Voir aussi la note de M. Carbonnier au D.1946, 321.

adoptée en ce qui concerne la loi du 16 Novembre 1940, relative au transfert de la propriété des immeubles, et la loi du 2 Avril 1941, sur le divorce. Un nouveau problème se pose alors à la Cour de Cassation.

Certains arrêts s'étaient refusés, pendant l'occupation, à appliquer les lois de Vichy. Ainsi, un arrêt de la Cour d'appel de Nancy du 28 Mars 1941 n'avait pas respecté les dispositions de l'article 233 C. civ. (modifié par la loi du 2 Avril 1941) et avait prononcé un divorce alors que les époux étaient mariés depuis moins de trois ans, ce qui était contraire au texte légal. De même, certaines décisions n'avaient tenu aucun compte de la nécessité d'obtenir, en conformité avec les exigences de la loi du 16 Novembre 1940, avant toute vente d'immeuble, une autorisation préfectorale. Des pourvois étaient pendants devant la Cour de Cassation lorsque la loi de 1940 fût annulée par l'ordonnance du 2 Novembre et celle de 1941 par l'ordonnance du 12 Avril 1945. Quelle devait être l'attitude de la Cour de Cassation?

S'il s'était agi d'une simple abrogation, la question aurait été aisément résolue. Supposons, par exemple, que l'article 233 *C. civ.* ait été abrogé au lieu d'être annulé, et reprenons l'hypothèse d'une Cour d'appel qui aurait prononcé le divorce sans tenir compte de ce texte alors qu'il était en vigueur. Selon les solutions reçues en matière de conflits de lois dans le temps, rien ne se serait opposé à l'application de la loi nouvelle devant la Cour de Cassation, et, cependant, celle-ci se serait refusée à l'appliquer, elle n'aurait pas manqué de casser l'arrêt de la Cour d'appel en vertu de la loi abrogée.

Or, c'est exactement le contraire qui se produit ici. Sans doute, un arrêt de la Chambre Civile de la Cour de Cassation, du 16 Juillet 1945,[6] applique la solution habituelle en cassant une décision qui n'avait pas respecté l'article 233 C. civ., mais un grand nombre d'arrêts rejettent les pourvois basés sur la non application des lois de 1940 et de 1941.[7] Il en résulte une conséquence curieuse, paradoxale.

Si les juges du fond ont fait application des textes annulés, tout se passe comme si la loi était simplement abrogée. Les jugements rendus sont considérés comme étant des " effets " produits par la loi disparue et dès lors, ils échappent aux conséquences de l'annulation.

Si, au contraire, les juges du fond, pour une raison quelconque, n'ont pas appliqué effectivement les textes annulés, le pourvoi formé contre eux est rejeté, la Cour de Cassation faisant alors abstraction de la loi annulée pour appliquer la législation antérieure à cette loi.

Cette apparente contradiction peut s'expliquer par l'idée suivante: lorsque la loi annulée n'a pas été appliquée, le motif de stabilité sociale pour lequel le législateur accepte d'écarter l'effet rétroactif de la nullité n'a plus lieu d'intervenir. Il n'y a plus aucune raison de ne pas laisser la nullité produire, dans le passé, sa rétroactivité habituelle. L'opportunité, qui était venue limiter les règles ordinaires de la technique, leur cède de nouveau la place.

2°. *La situation de l'Alsace-Lorraine.*—L'Alsace-Lorraine ayant été incorporée au Reich, seules les lois allemandes se sont appliquées, dans ces provinces, pendant l'occupation. Ces lois sont annulées par l'ordonnance du 15 Septembre 1944,[8] art. 2: " Tous les textes édictés en toute matière par la puissance occupante dans les départements du Bas-Rhin, du Haut-Rhin et de la Moselle, quelle que soit leur forme et leur dénomination, sont et demeurent nuls et non avenus . . . ". Il s'agit donc, là encore, d'une nullité de principe. Cependant l'art. 5 de la même ordonnance prévoit que certaines dispositions peuvent être maintenues

[6] D.1946, 321, note Carbonnier, *S.*1946, I,6, note G.L.

[7] Arrêts des: 18 Décembre 1945 (Id. loc.),—20 Mai 1946 (D.1946, 324,—*J.C.P.* 1947, II, 3485),—5 Novembre et 3 Février 1947 (*J.C.P.*, 1947, II, 3461, note R.C.).

Voir également: Conseil d'Etat, 10 Janvier 1947 (*S.* 1947, 3.68) qui décide: " Il n'y a pas lieu à statuer sur les recours dirigés contre des arrêtés d'internement administratifs pris en vertu de lois déclarées rétroactivement annulées."

[8] *J.O.*, 16 Septembre 1944, p. 814—Rectificatif: *J.O.*, 19 Septembre 1944, p. 821.

provisoirement en vigueur (notamment en matière fiscale et sociale) et certains de leurs effets conservés définitivement. Sauf la différence fondamentale, provenant de l'origine des textes annulés, on retrouve donc, dans une certaine mesure les distinctions dégagées précédemment en ce qui concerne l'annulation des lois de Vichy. La technique est la même.

Les solutions sont au contraire différentes en ce qui concerne le sort des jugements rendus pendant l'occupation.

B. Les jugements

1°. *En France (hormis l'Alsace-Lorraine).*—Si l'on excepte les jugements rendus par les juridictions allemandes d'occupation, qui, comme les lois allemandes, sont considérés, du seul fait de la libération, comme ayant toujours été dépourvus d'effet, on doit noter que les jugements rendus par les tribunaux français l'ont toujours été au nom du " Peuple français." Cette formule qui s'était substituée à la formule traditionnelle " Au nom de la République française," n'empêche pas que nos tribunaux n'aient statué en pleine indépendance. On s'explique par conséquent que leurs décisions soient maintenues purement et simplement.

En fait, on ne trouve, à cet égard, aucune précision dans les textes postérieurs à la libération, mais la solution allait de soi et n'a jamais fait l'objet de la moindre difficulté. Tout au plus le législateur s'est-il borné, pour l'avenir à reproduire l'ancienne formule exécutoire.

Toutefois, il était une catégorie de jugements pour laquelle on pouvait hésiter: devait-on valider les décisions rendues par les tribunaux d'exception créés par le gouvernement de Vichy? L'ordonnance du 9 Aout 1944, art. 8, répond affirmativement à cette question. Elle apporte cependant un correctif indispensable. Certains de ces tribunaux avaient eu à juger des actes commis par des patriotes pour la cause de la libération, actes qualifiés de " terroristes " par la législation de Vichy. Il était impossible de maintenir de telles décisions. Aussi, l'ordonnance prévoit-elle expréssément la révision des jugements déjà rendus contre des patriotes.

2°. *La situation de l'Alsace-Lorraine.*—Tout autre est la situation de l'Alsace-Lorraine. Dans cette province, en effet, les tribunaux français avaient été remplacés par des tribunaux allemands statuant au nom du gouvernement allemand et appliquant les lois allemandes. Il fallait donc organiser un contrôle beaucoup plus efficace. Tel est l'objet des art. 8 et 9 de l'ordonnance du 15 Septembre 1944.

L'art. 8 de ce texte est relatif aux jugements et arrêts rendus par les juridictions civiles et commerciales. L'ordonnance distingue: si la décision en cause n'a pas encore été exécutée, il est nécessaire d'obtenir au préalable l'exequatur d'un tribunal français—si la décision a déjà été exécutée, il est possible aux intéressés d'en demander la révision dans le délai de 12 mois qui suit la cessation des hostilités.

L'art. 9 a pour objet les condamnations pénales prononcées postérieurement au 16 Juin 1940. Ces décisions peuvent être révisées " toutes les fois que dans leur principe ou dans leur quantum, elles seront contraires aux règles du Droit pénal français ou qu'il sera constant que l'attachement du condamné à la France a déterminé ou aggravé la peine."

Ces dernières considérations nous conduisent à aborder la deuxième partie de cet exposé. Les textes que nous venons de signaler, en effet, ne règlent pas seulement le sort des actes ou des décisions judiciaires rendues sous l'occupation, ils envisagent également (notamment en organisant la révision des jugements), les mesures de réparation destinées à pallier au préjudices soufferts par les particuliers à la suite des actes commis par l'occupant ou sur son instigation.

II. *Les mesures de réparation*

La révision des jugements se révélait dans certains cas insuffisante. En effet, certaines lois, certains actes de déprédation commis par les Allemands, n'avaient fait l'objet d'aucune décision judiciaire. Il en était ainsi par exemple des nombreuses spoliations commises à l'encontre des Alsaciens Lorrains, des Israëlites et des Français qui avaient quitté le territoire métropolitain pour rejoindre le Gouvernement provisoire de la France libre.

Si dans certains cas, le Droit commun pouvait suffire à remédier à certaines situations,[9] dans la plupart des cas il en était autrement et il fallait prévoir un régime exceptionnel destiné à pallier une situation également exceptionnelle.

On aurait pu songer à réparer le dommage causé aux spoliés au moyen d'une indemnisation en valeur, analogue à celle qui est pratiquée en ce qui concerne la réparation des dommages de guerre. Mais cette charge se révèlant déjà écrasante pour le budget, le législateur a préféré adopter un autre principe: celui de la restitution en nature des biens spoliés.

Dans certaines hypothèses cette restitution ne fait aucune difficulté. Il en est ainsi notamment lorsque l'Etat français a pu récupérer les biens mobiliers pillés par les Allemands. Une ordonnance du 11 Avril 1945,[10] a réglementé la dévolution et la revendication de ces biens. Ainsi de précieuses collections d'œuvres artistiques ont pu être restituées à leur légitimes propriétaires.

Mais, c'est là l'exception. Le plus souvent la revendication oppose aux intérêts du revendiquant les intérêts d'un acquéreur qui n'est pas toujours de mauvaise foi. Il faut donc prendre parti. Tel est l'objet de l'ordonnance du 21 Avril 1945, sur la restitution des biens spoliés.[11]

[9] Signalons plusiers applications du droit commun à propos des biens délaissés momentanément par leur propriétaire, au cours de l'exode de Juin 1940, ou au cours de bombardements: Dans le nombreux cas, les Allemands se sont emparés de ces biens, notamment des automobiles ou tracteurs et de chevaux. Par la suite ils les ont souvent revendus à des particuliers. Il est danc arrivé que le propriétaire initial retrouve son bien dans les mains d'une autre personne qui l'avait acquis des Allesmands. Dans la grande majorité des cas, les tribusaux ont admit l'action en revendication exercée contre l'acquéreur, sur le fondement de l'art. 2279, al.2, *C.civ.*, et même contre le sous acquéreur de bonne foi. (En ce sens: Dijon, 2 Février 1942 et 21 Janvier 1943, *J.C.P.*, 1943, II, 2202, note Saint Alary,—*D.C.* 1944, *J.*, 30; note Lalou,—Rouen, 24 Février 1943, *S.* 1944, 2.37, note Dupond,—Rouen 17 Mai 1947, *D.* 1947, 401,—Rouen 2 Mai 1947, *J.C.P.* 1947, IV, p. 175,—Adde: Solus, De la revendication des objets mobiliers entre les mains de tiers les ayant reçus des armées d'occupation, Revue Trimestrielle de Droit Civil, 1943, p. 50 et 126,—J. Vandamme, Contribution à l'étude de la revendication des épaves terrestres, Revue Trimestrielle de Droit Civil, 1943, p. 157).

[10] *J.O.*, 12 Avril 1946, p. 2010.

[11] *J.O.*, 22 Avril 1945, p. 2283 (Rect. *J.O.*, 29 Avril 1945, p. 2436) modifiée par les lois du 19 Juin 1947 (*J.O.*, 20 Juin 1947, pp. 5710 et 5711).

Voir les commentaires de cette ordonnance par MM.: Cheauveau (*J.C.P.*, 1946, I, 550), Esmein (*Gaz. pal.*, 1945, 2, I),—Lyon Caen (thèse, Paris, 1945), Sarraute et Tager (*Gaz. pal.*, 1945, 2, 23),—Vizioz (*J.C.P.*, 1947, I, 597).

En présence des innombrables procès qui ont suivi l'entré en vigueur de cette ordonnance, on peut se demander si le principe de l'indemnisation en valeur n'aurait pas été finalement préférable. Il y a là un problème difficile à résoudre. On comprend l'intérêt du revendiquant à récupérer son bien en nature, puisque celui-ci a, par suite de la dépréciation du franc, augmenté très sensiblement de valeur.

Signalons aussi les mesures prises en faveur des personnes expulsées de leur logement par les Allemands. L'ordonnance du 14 Novembre 1944 (*J.O.*, 15 Novembre 1944, p. 1309,—Rect., *J.O.*, p. 1356) prévoit les modalités de la réintégration des locataires ainsi expulsées (voir les commentaires de MM.: Esmein, *Gaz. pal.*, 2 et 6 Mars 1944,—article signé P. D., *J.C.P.*, 1945, I, 453. Cette ordonnance a été complétée par une loi du 7 Mai 1946 (*J.O.*, 8 Mai 1946, p. 3889) qui suspend la réintégration prononcée au profit d'un étranger contre un Français, toutes les fois qu'un local süffisant n'a pas été mis à la disposition on de celui-ci.

Signalons également une autre ordonnance du 14 Novembre 1944 (*J.O.*, 15 Novembre 1944, p. 1310,—Rect. *J.O.*, 22 Novembre 1944, p. 1421) portant première application de l'ordonnance du 12 Novembre 1943 sur la nullité des actes de spoliation (voir le commentaire de ce texte par M. Lagarde, *J.C.P.*, 1945, I, 452).

Plusieurs points doivent être envisagés: quels sont les bénéficiaires de ces mesures exceptionnelles—quels sont les cas de restitution—quels en sont les effets?

En ce qui concerne les bénéficiaires, on s'est demandé, pendant un certain temps, si le texte ne s'appliquait qu'aux Français, ou si l'on dévait également l'appliquer aux étrangers. La pratique s'est fixée dans ce dernier sens. Un seul point demeure controversé: celui de savoir si un juif allemand peut bénéficier de l'ordonnance du 21 Avril 1945.[12]

L'ordonnance parait plus précise en ce qui concerne les cas dans lesquels la restitution doit avoir lieu, mais, là encore des difficultés se sont révélées en pratique.

L'ordonnance procède par voie de distinction: elle distingue suivant qu'il s'agit d'une dépossession forcée (art. I), ou que l'acte a été accompli avec le consentement du spolié (art. XI). Dans le premier cas l'acte est nul de droit—il est simplement annulable dans le second.

Cette distinction parait raisonnable.

Les éléments de la dépossession forcée sont aisément déterminables. Il faut tout d'abord qu'il s'agisse d'un acte de disposition, les actes d'administration ne sont pas visés par l'ordonnance. Il faut ensuite que cette dépossession soit intervenue entre le 16 Juin 1940 et le 9 Aout 1944 et qu'elle soit la conséquence de " mesures exorbitantes du droit commun." En effet, certaines dépossessions ne sauraient être remises en cause; il en est ainsi des réquisitions ordinaires ou même de celles pratiquées par les allemands, mais justifiées par les coutumes de la guerre—de même les expropriations pour cause d'utilité publique demeurent valables. On veut uniquement atteindre les actes de déprédation commis par les Allemands ou inspirés par leur idéologie raciste.

Il est, au contraire, bien plus délicat de déterminer ce qu'on doit entendre par " actes accomplis avec le consentement du spolié." Il s'agit ici des personnes dont les biens n'avaient pas encore fait l'objet de mesures exorbitantes du droit commun, mais qui, craignant de s'en voir dépossédées, ont préféré les aliénér. Les textes généraux du code civil se revelant alors insuffisants la loi pose en principe que le consentement de ces personnes n'a pas été libre, qu'il a été vicié par la violence. Si les intéressés n'avaient pas redouté une dépossession, il est à présumer qu'ils n'auraient pas vendu leurs biens. Toutefois cette présomption cesse de s'appliquer si le détenteur actuel du bien prouve que celui-ci a été acheté au " juste prix," c'est à dire au prix courant à l'époque de l'acquisition; dans ce cas, il est nécessaire que le revendiquant fasse la preuve de la violence.[13]

Enfin, pour délimiter le domaine des art. I et XI, la jurisprudence s'attache à préciser la notion de " consentement." Il ne suffit pas, pour échapper à la nullité de droit prévue par l'art. I, que le propriétaire dépossédé ait concouru matériellement à l'acte, c'est à dire qu'il y ait assisté et même qu'il l'ait signé sous la pression de l'administrateur qui lui avait été nommé, il faut qu'il y ait joué un rôle actif. Il s'agit là d'une question de fait susceptible de varier dans chaque espèce, ce qui explique la diversité de la jurisprudence sur ce point.[14]

Quant à la nature de l'action intentée par le spolié, il s'agit, sans aucun doute, d'une action en nullité. Certains auteurs,[15] ont voulu y voir une action en

[12] En matière de spoliations, la jurisprudence paraissait plutôt favorable à l'application de l'ordonnance, même aux israëlites allemands (voir notamment, Paris, 10 Décembre 1945, *J.C.P.*, 1946, II, 2983), mais un arrêt de la Chambre Sociale de la Cour de Cassation, du 28 Novembre 1946, intervenu dans une affaire de réintégration, se prononce en sens contraire et refuse la réintégration (*J.C.P.*, 1947, II, 3417, note J. G. L.).

[13] Encore est-il nécessaire que le spolié n'ait pas trompé son contractant sur son appartenance juive; dans ce cas, un arrêt de la Cour de Paris du 2 Décembre 1946 (*S.*, 1947, 2, 97, note G. B.) décide que l'action en nullité est irrecevable.

[14] Voir notamment les décisions citées par Chauveau (op. cit., loc. cit.).

[15] Sarraute et Tager, op. cit., loc. cit.

nullité absolue, mais on s'accorde généralement pour admettre qu'il ne s'agit que d'une nullité relative susceptible de confirmation.[16]

On retrouve, en ce qui concerne les effets de l'action en nullité, la distinction faite par l'ordonnance suivant que le propriétaire dépossédé a ou non consenti à l'acte. Lorsqu'il y a eu simple vice du consentement, les effets de la nullité sont, en principe, ceux du Droit commun. Le détenteur doit restituer le bien—le revendiquant doit restituer le prix principal payé par l'acquéreur, les frais de l'acte, les impenses nécessaires et les impenses utiles dans la mesure de la plus value procurée par elles.

Toutefois, lorsque l'acquéreur a connu, au temps de l'acte, les circonstances qui en ont entrainé l'annulation, et que l'acquisition n'a pas été faite au " juste prix," les conséquences de la nullité sont plus rigoureuses. On assimile cette hypothèse au cas où il y a eu dépossession pure et simple. Le détenteur doit restituer le bien, et ses accessoires, les fruits, et peut être condamné à des dommages-intérêts pour tout dommage causé, par sa faute ou par son fait, à la chose revendiquée. Le revendiquant ne doit rembourser les sommes payées par le détenteur que dans la mesure où il en a tiré profit; il ne doit jamais les frais de l'acte d'acquisition.

Enfin l'ordonnance contient un certain nombre de dispositions relatives à la procédure ou tendant à réprimer les agissements de ceux qui tenteraient de se soustraire aux revendications.

III. *Questions diverses*

S'il convenait, avant toutes choses, d'effacer, dans la mesure du possible les souvenirs de l'occupation, et de réparer les préjudices soufferts par les particuliers, il fallait encore résoudre certains problèmes de portée moins générale, mais d'un incontestable intérêt pratique.

Deux questions méritent principalement d'être envisagées:

A. Les crimes de guerre

Lorsqu'il s'est agi de définir les crimes commis par les Allemands, en France, durant l'occupation, on s'est tout naturellement référé aux conventions de La Haye, aux lois et Coutumes de la Guerre. Telle est notemment la méthode employée par l'ordonnance du 28 Aout 1944.[17]

B. Les actes passés par les particuliers

En ce qui concerne le sort des obligations contractées par des particuliers avant ou pendant l'occupation, les règles du Droit interne français se sont révèlées suffisantes. Ainsi l'ordonnance du 9 Aout 1944 ne contient aucune disposition relative aux actes passés par des particuliers. Toutefois, l'ordonnance du 15 Septembre 1944 relative aux départements d'Alsace et de Lorraine, précise dans son article 7: " Les actes juridiques et engagements contractuels conclus valablement sous l'empire de la législation de fait en vigueur dans les trois départements sont validés.

Seuls demeurent nuls leurs effets contraires à l'ordre public français.

Cependant les dévolutions successorales effectuées suivant d'autres règles que celles en vigueur au 16 Juin 1940 seront, quelle que soit la date de l'ouverture de la succession, annulées à la requête de tout ayant droit formulée avant l'expiration du douzième mois qui suivra la date légale de la cessation des hostilités et remplacées par des dévolutions conformes à la législation maintenue en vigueur à l'article 3 (ancienne législation et lois de Vichy maintenues en vigueur)."

D'autre part, un arrêt de la Cour d'appel de Paris du 22 Mai 1947 (*D.* 1947,

[16] Esmein, op. cit., loc. cit.,—Chauveau, op. cit., loc. cit.,—voir notamment un jugement du Tribunal Civil de la Seine, en date du 27 Juin 1945 (*J.C.P.*, 1946, II, 2948) qui refuse l'action en revendication à un propriétaire dépossédé lorsque celui-ce a confirmé la vente en acceptant, postérieurement à la libération de toucher un supplément du prix de la vente initiale.

[17] Article I. (*J.O.*, 30 Aout 1944, p. 780).

380) est intéressant en ce qu'il déclare nul, comme ayant une cause illicite, le contrat passé entre deux entrepreneurs français et ayant pour objet l'exécution en France de travaux pour le compte des Allemands.

Enfin, la question de la monnaie de payement utilisée par les particuliers pour se libérer de leurs dettes ne s'est pratiquement pas posée. La monnaie allemande n'a été employée en France que pendant une très courte période et en faible quantité. Les troupes allemandes recevant une indemnité d'occupation payée en devises françaises, il s'est naturellement produit une inflation suivie d'une dépréciation du franc. Mais les tribunaux français reprenant une théorie déjà appliquée à la suite de la guerre de 1914/1918, ont toujours décidé que le débiteur pouvait se libérer en monnaie dévaluée, sans qu'il y ait lieu de changer le montant nominal de la dette primitive. Théoriquement, le franc est toujours semblable à lui-même (argument tiré de l'article 1895 *C. civ.*).

A NEW LAND LAW FOR CYPRUS [1]

[*A short survey by* The Hon. Stelios Pavlides, K.C., *Attorney-General, Cyprus.*]

Introductory.—The Ottoman Land Laws have their origin in the Sheri (Sacred) Law which indeed formed the source out of which flowed the various characteristics of the *modus operandi* and *vivendi* of the Moslems as fighters, conquerors and reformers and was a system of law enforced in, and respected by, the Islamic world long before the Ottoman Empire had been founded. Conquered land formed an important part of the spoils and, as a general rule under the then existing notions, it was divided between the State and the warriors who had taken part in its conquest. The incidents of tenure under such system were not always uniform, but the first broad distinction of lands into Memloukés and Ghairi Memloukés, that is lands vesting in full ownership and lands not so vesting, came to be recognized at an early stage as the basis of land tenure under the Sheri Law.

As time went on, considerable developments and changes were effected, but it was not until the reign of the Sultan Suleiman the Legislator that the first codification of land laws was attempted and it was not until more than 350 years later that the more complete Ottoman Land Code of the 7 Ramazan 1274 (April 21, 1858) was enacted; supplemental to the Code and between the date of its enactment and of the British occupation of Cyprus in 1878, there were promulgated several other enactments, particularly the various Tapu Laws and the Laws relating to the extension of inheritance, which, save as amended from time to time by local statute, constituted the Land Laws in force in Cyprus until the present Immovable Property (Tenure, Registration and Valuation) Law, 1945, came into force on September 1, 1946.

Ottoman Land Laws.—It is not intended to give in this survey anything but the broadest outline of the Ottoman Land Laws and then only in so far as it may be necessary to measure up the changes effected under the new legislation.

Land fell into five classes, namely:—

(i) Mulk and Arazi Memlouké, that is land possessed in full ownership and mainly consisting of buildings and sites within the limits of towns and villages; it devolved by inheritance like movable property and the general provisions regarding dedication, mortgage, gift or pre-emption applied to it;

(ii) Arazi Mirié, that is State land, the legal ownership of which was vested

[1] Dr. C. K. Meek's admirable "Land Law and Custom in the Colonies" (Oxford University Press, 1946) must have gone to print before the change in the Land Laws of Cyprus, and his chapter on the subject gives perforce the picture under the Ottoman Land Code.

in the Beit-ul-Mal (Treasury) comprising mainly arable fields. This formed the bulk of the land in Cyprus and was rightly described as a heritable leasehold.

In theory such land was not " owned " but only " possessed," the possessor, however, being able to sell or mortgage the same without restriction, though he could not dispose of it by will, inheritance of Arazi Mirié lands being governed by Law 17 Muharrem, 1284 (May 21, 1867);

(iii) Arazi Mevkoufé Takhsisat which, though its name might have led one to suppose that it was Vakf property, was in fact land subject to the same provisions as those applicable to Arazi Mirié with the exception that certain fees payable in respect of such land upon transfer or succession were paid to the Vakf concerned instead of to the public revenue (Takhsisat in fact means " special appropriations of revenue ").

As a precursor to the contemplated repeal of the Ottoman Land Laws, this class of land was converted into Arazi Mirié by Law 14 of 1944;

(iv) Arazi Metrouké, that is land left for the use of the public, e.g., public highways and common pastures;

(v) Arazi Mevat, which was graphically but not convincingly described as land which lay at such distance from a village or town that " the loud voice of a man could not be heard at the nearest point where there is an inhabited place."

In addition to these well-defined categories of land which were dealt with in the Land Code, there was, of course, the class of immovable property known as Vakf which did not come at all under that Code but under the special Vakf Laws. The term Vakf is generally used to denote property which is dedicated by a person having the full ownership thereof (in other words, Mulk property) on condition that the income (usufruct) should be applied to some pious or religious object. Originally, the whole income was so devoted but, from an early period, it was permitted to turn property into Vakf though part of the income only was to be applied to pious or religious objects, the remaining being enjoyed by the dedicator during his lifetime and by some other person after his death, and so on from generation to generation; as time went on, this diversion from the original idea was further extended, and it was permitted to dedicate property and convert it into Vakf even if the whole of the income went to the dedicator himself during his life and to certain named person or class of persons after his death, provided that, when such person died or such class of persons became extinct, the income would be applied to some pious or religious object. The convenient argument was that, as long as the ultimate, though remote, object was a pious or a religious one, the whole of the income could be enjoyed for generations by the nominees of the dedicator.

Vakfs are divided into certain classes and there was in Turkey a special Ministry of Evcaf administering some of them and supervising others. In Cyprus, Vakfs are vested in, or administered by, the Delegates of Evcaf (depending on the class to which a Vakf belongs) under the Evcaf (Mohammedan Religious Property Administration) Order in Council, 1928.

A particular class of Vakf was what was known as Idjaretein. This was originally truly and fully Vakf property. True Vakf, however, could not be leased, except for a limited period, usually for three years, at a fixed rent (called single rent). When a Vakf fell into disrepair and its income at single rent was not sufficient to enable the administrator to repair it or re-construct it, rather than see it destroyed altogether, the administrator, by the permission of the Judge, could lease it at what was called " double rent "; this meant that the administrator was allowed to lease it in perpetuity by collecting in cash a sum equal to the full value of the property and also by charging the property with an annual charge (idjaré); the charge was, in most cases, only nominal and was imposed in order to emphasize the fact that the purchaser did not become the full legal owner but only held the property on a kind of perpetual lease. The Vakf so leased on double rent became Idjaretein.

Generally speaking, the possessor of Idjaretein was as free to deal with this type of property as the possessor of Arazi Mirié. (The basic differences being that, in the case of Arazi, the " legal ownership " vested in the Crown, whereas in the case of Idjaretein it vested in the Evcaf administration and that registration and other fees on Idjaretein were paid to the Evcaf instead of being paid into revenue.

Again, as a precursor to the abolition of the Ottoman Land Laws, this category of Vakf land was converted into Mulk by Law 14 of 1944, the Delegates of Evcaf receiving annually £2,230 as compensation for the loss of their revenue resulting from the conversion.

Immovable Property (Tenure, Registration and Valuation) Law, 1945.—Demands for the supersession of the Ottoman Land Code had been strongly advanced over a long period and, a specially appointed Committee, after many years' deliberation, submitted in 1934 proposals in the form of a Bill of 433 sections, which, in addition to the familiar subjects of tenure, registration and valuation proper in a Land Code, incorporated the Law relating to Wills and Succession and a complete Mining Law.

The Bill was found to be unmanageable for enactment as a single measure, and no progress could be made until the matter was reviewed by the writer in 1945 and the above new Law enacted, coming into operation on September 1, 1946.

The Law is divided into five Parts (Part II containing two Chapters), and it is proposed to give a short summary of the main provisions in each part:—

Part I. Preliminary.—Definitions.

This Part contains definitions and also the all-important section 3 which abolishes all the categories of immovable property known under the Ottoman Land Code under the names already given.

As already stated, the Arazi Mevkoufé Takhsisat and Idjaretein had already been converted into Arazi Mirié and Mulk respectively; the former Mulk, Arazi Memlouké and Arazi Mirié lands privately held or enjoyed at the commencement of the Law became the private property of the owner without distinction. With regard to Mulk and Arazi Memlouké, this only meant the abolition of the names as specified categories since, as already stated, this was a form of tenure under the Ottoman Land Code which already ensured to the owner full enjoyment of his land as his private property. The assimilation of Arazi Mirié was of greater consequence; the fiction of State ownership and perpetual leasehold by the possessor came to end and, with it, disappeared the restriction on testamentary disposition and the differentiation between succession to Mulk and transmission of Arazi lands.

The lands of the Arazi Metrouké category enjoyed communally by a town, village or quarter, lost their particular Turkish nomenclature but continue to be held as the communal property of such town, village or quarter, whilst the Arazi Mevat and all other unspecified land, together with all vacant or unoccupied land, not privately owned or lawfully possessed at the date of the coming into operation of this Law, vested in the Crown as Crown property.

Vakf property remains unaffected except for some short provisions under Chapter II of Part II, which will be dealt with in due course.

Part II.—Tenure.

Chapter I.

Chapter I of this Part deals with immovable property other than Vakf.

Extent of Private Ownership.—Private ownership of land extends to the surface and to the substance of the earth beneath the surface and to the space

above the surface reasonably necessary for the enjoyment thereof, but does not extend to minerals except for minerals lying under some areas specified on a survey map deposited in the Land Registry Office. These areas comprise what were formerly lands of the Mulk category, and this provision was instituted in order to safeguard existing rights over minerals, the position under the Ottoman Land Code being that minerals in Mulk land belonged to the owner of the land.

Storeys of a Building.—Separate horizontal ownership of buildings is retained but provision is made that the site on which they are standing, the main supporting walls, the roof, the main staircase and other parts in common use shall be owned and held by all the owners in undivided shares. The owner of each storey may make alterations or repairs to his storey, provided that they do not prejudice the rights of the owner of any other storey and they do not unduly interfere with the enjoyment of such owner of his storey. Parts owned in common are to be maintained and repaired at the expense of the owners of the component storeys in proportion to the value of each storey and provision is made enabling the owner of one storey to proceed with the necessary repairs and recover the share of the expenses from a defaulting owner by civil action.

Lakes and Rivers.—Lakes and rivers not privately owned are vested in the Crown. Rivers in Cyprus are really nothing more than streams, the water of which mostly runs to waste in the winter but is very jealously preserved in the summer; the use of the water is mostly regulated by custom and long uses though, as a relic of the past, there are still in Cyprus rivers completely owned by private individuals under Firmans granted by Sultans before the British occupation in 1878; these Firmans have been declared effective by successive judgments of the courts and the rivers to which they relate are still the property of the Firman holders or their heirs.

Public Roads and Foreshore.—Much uncertainty existed in matters relating to public roads and the foreshore under the Ottoman Law; the new Law makes it clear that such roads and the foreshore vest in the Crown for the use of the public.

Prescription.—The provisions as to prescription have undergone a complete change. It is unnecessary to elaborate upon the distinction obtaining under the Ottoman Laws between acquisitive prescription and between limitation of time for actions in respect of immovable property; it suffices to say that, subject to the usual reservations as to disabilities, as respects Mulk property, the period of pre-emption was 15 years (under the Civil Code) and, as respects Arazi Mirie' land, 10 years; a law enacted in 1886 and cited as the Immovable Property Limitation Law purporting to amend the Law as to the acquisition of title to immovable property by adverse possession (now repealed) confused rather than clarified the position.

Under the new Law, the form of acquisitive prescription is retained and proof of undisputed and uninterrupted possession for thirty years without the consent, express or implied, of the person who would have been entitled to possession, entitles the actual possessor to be registered as the owner of the property. Reservation is made with regard to properties which began to be adversely possessed before the commencement of the Law but so that the period, notwithstanding any disability, shall in no case exceed thirty years even if the disability continues to subsist at the expiration of thirty years.

There are two important exceptions to the rule about prescription. No title to immovable property can be acquired by adverse possession as against the Crown or a registered owner; the former is merely a re-statement of the rule "nullus tempus occurrit regem", but the full protection of a registered owner against the loss of his property by adverse possession for any length of time is a new feature and is in keeping with the expressed policy that every encouragement should be given to owners of land to complete their title by registration.

Easements.—Easements over the property of another cannot be acquired except under a grant recorded in the books of the Land Registry Office or unless the same have been exercised without interruption for thirty years or have been recognized by a judgment of a court or conferred by a valid document made before 1878. Such easements are attached to the immovable property in respect of which they have been acquired and are deemed to be included in any dealing made with such property.

Common Ownership of Trees and Land.—One of the most unsatisfactory features of tenure, which was accentuated under the Ottoman Land Laws, was that land and trees or buildings planted or erected on the land could be under different ownerships. The English and Roman rule " solo cedit quod solo inaedificatur " prevailed in the converse under the Ottoman Laws and the fact that trees and buildings came under the description of Mulk whilst the land on which they were planted or erected was mostly of the Arazi Mirié category enhanced the confusion and created almost ludicrous situations. If an enterprising trespasser succeeded in planting trees on the Arazi Mirié land of another and, for some reason no steps were taken to uproot them within three years, the Ottoman rule that the soil became subject to the Mulk thing placed on it became operative with the result that the Arazi Mirié merged in the Mulk and ceased to have separate existence.[2]

The general aim of the new Law, indeed what it is hoped will be one of its most beneficial effects, is to bring trees and land under one ownership; also to bring under one common ownership immovable property held in undivided shares. Provision is made that, when trees or buildings are found on land belonging to a person other than the owner of such trees or buildings, neither owner can transfer his interest, unless he satisfies the Land Registry authorities that the owner of the other interest does not wish to purchase such interest at the price at which it is offered for sale, or unless the prospective purchaser advertises the proposed sale in newspapers giving to the owner of the other interest the option to have the seller's interest transferred to his name, on payment of the price. Analogous provisions ensure an option to purchase the share in the immovable property of one of the co-owners who desires to sell his interest. And where any tree or building is owned by a person other than the owner of the land on which the same is found, the Land Registry Office authorities may, on the application of the owner of such tree or building, effect a partition or re-adjustment of the interests of the parties so as to ensure that the trees and buildings and the land on which they are found shall come under one and the same ownership and, when no such partition or re-adjustment is possible, the owner of the greater interest may acquire compulsorily the minor interest on payment of its value as estimated by the Director, subject to an appeal to the court.

Fragmentation of Holdings.—The fragmentation of holdings into plots of small and uneconomic size and value, which is another scourge in the economic life of the Colony, is guarded against under certain rules which will govern all divisions or partitions of immovable property; in the case of land irrigated from a perennial source, no division can be made into plots of less than one donum [3] in extent; in other cases, the land cannot be divided into holdings of less than two donums, plots of this size being considered as offering plots of an economic value.

Chapter II. Vakf Immovable Property

As already explained, no immovable property could be effectively dedicated and become Vakf unless the property was of the Mulk category and, as such, held in full ownership; Arazi Mirié lands could never be dedicated. With the abolition of the various categories of land and under the new form of tenure, the

[2] Ottoman Land Code, Art. 25; *Gavrielides* v. *Haji Kyriaco,* 4 *C.L.R.* 84.
[3] A donum is an area of 1,600 square yards.

result would be that lands which could not be previously dedicated could now be made Vakf.

An extension in that direction was not contemplated and had to be guarded against; on the other hand, it was not intended that the Moslem world should be deprived of their ancient right to make valid dedications and provision has been made that immovable property lying within certain specified areas may be made Vakf; these areas comprise land which was formerly of the Mulk category.

Immovable property lying outside those areas can only be made Vakf if they are sufficiently planted with trees or vines or covered with buildings to the satisfaction of the Director and then only if a fee equal to one-fourth of the registered value of the property is paid. This is in accordance with the position already explained as to the merger of Arazi Mirié into Mulk; though the land may have been originally Mirié, when covered with trees or buildings it ceased to have separate existence and was held and enjoyed by the owner of the Mulk trees or buildings as his own private property and as such could be made Vakf.

Part III. Registration

Registration and valuation of immovable property was formerly dealt with under the Immovable Property Registration and Valuation Laws, 1907 to 1943, and this Part and the next Part, except for a few new features, re-state the position but in a considerably simplified form.

An innovation is the provision with regard to the registration of immovable property belonging to religious corporations. For some obscure reason, though property belonging to such corporations could be registered in the Central Land Registry Office, no title deeds could be issued in respect thereof; further, no religious corporation could be forced to register its immovable property as was the case with regard to other persons or bodies. The new Law enables such corporations to apply within five years from the commencement of the Law for the registration of such property in their name and for the issue to them of title deeds.

The power of the Director to compel registration of unregistered property is retained and the Director may exercise such power either as respects all the property in a town or village or as respects any part thereof or even any property belonging to any one individual.

To supplement the policy for the unification of the ownership of land and of anything standing thereon, provision is made prohibiting the separate registration of land and of anything thereon.

An important new feature is the provision that all disputes as to the boundaries of any registered land must, in the first instance, be determined by the Director and that no court shall entertain any action relating to any such dispute, unless it had been first determined by the Director.

Part IV. Valuation

The existing powers of the Director for valuations and revaluations of immovable property are retained.

Revaluation of property already valued cannot be made at intervals of less than five years, except in cases in which, since the last valuation, the property has been materially reconstructed or its value has, for some other reason, been substantially increased. Revaluations are mainly made for the purpose of re-assessment of the tax payable on immovable property; and, where any such property has been destroyed or damaged to such an extent as to affect substantially its value, the owner may apply for its re-valuation under its new condition, so that the tax may be re-assessed on that basis.

Valuations are made by valuers appointed by the Governor and adequate provision is made for objections against valuations or revaluations; objections are dealt with in the first instance by the Director but every objector has the right to apply to the court for a final hearing of his objection.

Part V. Miscellaneous

This Part deals with general matters, such as the giving of notices and the payment of fees to village authorities in respect of various matters set out in the First Schedule.

Provision is also made in this Part that any person aggrieved by any order, notice or decision of the Director under the provisions of the Law may appeal to the district court. The decision of such court is not subject to appeal, save where a question of personal status is involved or where the amount in dispute exceeds twenty-five pounds.

The repeals include all the Ottoman Land Laws, such as were not previously repealed as well as several articles of the Mejellé (Ottoman Civil Code) which related to immovable property.

"CRIMINAL SCIENCE" AND PUNISHMENT

[*Contributed by* E. R. Guest, Esq.]

The arrival of a number of books and pamphlets for review, the majority published for the Department of Criminal Science in the Faculty of Law at Cambridge, tempts reflection upon the value and uses of this sort of literature. It is a commonplace that the real difficulty which any criminal case presents to a court is the determination, after conviction, of sentence. It seems an ideal opportunity to test the effect upon one's musings over this difficulty of these various essays and lectures directed to a consideration of what it is now popular to call "criminal science."

For over three-quarters of a century the treatment of convicted offenders has been growing milder, with full public approval. Messrs. Radzinowicz and Turner in their article on "Punishment" in (1)[1] and L. Radzinowicz in the later article on "The Assessment of Punishments by English Courts" in the same volume give a clear account of this development. Indeed, practically the whole substance of (2) is concerned with this tendency. As S. K. Ruck says in the first article (Developments in Crime and Punishment): "Not only are fewer people imprisoned now. Those who are imprisoned receive shorter sentences, and the prison sentences which have been inflicted in appreciably greater number of late years than at the beginning of the century are those of from three to six months at courts of summary jurisdiction."

Not only are prison sentences rarer and shorter but the treatment of offenders once imprisoned is altogether less repressive and punitive, as appears from the article in (1) by L. Radzinowicz on "The English Prison System." This development has been actively fostered by the Home Office itself, as is clear from the short history of its efforts to that end given in (6) by Sir Alexander Maxwell, at pages 4 to 9. Indeed, all this is so much a part of every-day thought amongst all who pay any attention whatever to penology as to be hardly worth mentioning.

The reasons generally advanced for the change of method as compared with a century ago are that the reform of the criminal is, or should be, all that is of value to a civilized community, that reformative treatment and punishment are really antitheses, and that reform of the individual offender will do more to lessen the incidence of crime than severity intended to deter. But are these accepted reasons either the true ones or backed by any mass of evidence upon which they could be judged? Some people at least think not. S. K. Ruck in the article already quoted from (2) says: "The revolution in the methods of treating crime

[1] The undermentioned volumes, from which quotations have been made in this article, are referred to, for the safe of brevity, by the numbers set out in this footnote.

(1) *The Modern Approach to Criminal Law.* (London: MacMillan & Co. 1945), pp. (ix) and 511. 21s.

(2) *Penal Reform in England.* (London: MacMillan & Co. 1946), pp. (x) and 192. 12s. 6d.

(3) *An Introduction to the Criminal Law in Australia.* (London: MacMillan & Co. 1948), pp. (x) and 128. 10s. 6d.

(4) *The Journal of Criminal Science,* Vol. One. (London: MacMillan & Co. 1948), pp. 207. 15s.

The above are in the English Studies in Criminal Science. Edited for Department of Criminal Science, Faculty of Law, University of Cambridge.

(5) *Crime and Punishment,* by the Viscount Templewood. (London: Stevens. 1947), pp. 26. 2s. 6d.

(6) *The Home Office,* by Sir Alexander Maxwell. (London: Stevens. 1948), pp. 22. 2s. 6d.

(7) *Criminal Justice and Social Reconstruction,* by Dr. Hermann Mannheim. (London: Kegan Paul. 1946), pp. (x), 290. 15s.

(8) *Mental Health and the Offender,* by Dr. J. R. Rees. (The Clarke Hall Fellowship), 23 pages. 1s.

which took place during the last generation is very remarkable, and very characteristic of this country. It was not effected as the result of any proved insufficiency of the old methods or demonstrable efficiency of the new. It is only within the last dozen years that any attempt has been made to analyze the comparative results of the various methods of treatment, and by that time the revolution was complete. The change was thus wholly empirical, but it had the unusual merit that it appealed equally to the open-minded and the close-fisted. It is seldom that the humanitarian reformer finds himself in the happy position of being able to show that his reforms will save money, and penal detention, involving the board, lodging and custody of the offender, is demonstrably more expensive than conditional release. In these circumstances it is not surprising that conditional release as a method of penal treatment rapidly gained favour." It is, indeed, possible that a general urge towards humanitarianism so strongly marked all over Europe, at any rate up to 1914, was as much responsible for the milder treatment of offenders as any improvement shown to arise therefrom in the prevention of crime. Such statistics as there are certainly seem to show a diminution in the number of convicted offenders from the end of the first great war up to 1938: but it is at least likely that this was as much due to improved social services, health and distribution as to more scientifically planned sentences. As F. O. Barnett wrote (quoted in (3)): " Every step taken to reduce unemployment, to give greater security to labour, in other words, to give labour a greater share in the fruits of production, will tend to lessen by at least one half the crime common in our midst."

To say this is not to decry the methods which have been increasingly adopted since the turn of the century. It is only to emphasize the astonishing degree of our ignorance of the true results of them. As L. Radzinowicz says in " After-conduct of Convicted Offenders in England " (1): " What happens to the many thousands of offenders, men and women, children, adolescents, and adults, first offenders and those far advanced on the road of crime, petty offenders or dangerous criminals, who are brought each year before the courts of the country and subjected to one of the punishments assigned by law? What is the effect of these penal measures and in what way do they influence the future conduct of individuals? What percentage of offenders do not revert to criminal activity after being at large for a certain time, and how does this coefficient of success evolve in relation to a particular kind of punishment, to a given age-group, to previous criminal records, or to certain types of offences? Similar questions arise when we examine the coefficient of failures, and it is even more difficult to establish the factors mainly responsible for the resumption of criminal activity. Hardly any of these questions can be adequately answered at present."

It may well be that this ignorance must be permanent. The difficulty in the way of obtaining full and accurate criminal statistics is notorious and well

emphasized by the same author's later essay in (1), " English Criminal Statistics." What little we do know provides remarkable surprises. The first example occurring concerns the effect of probation. Today it would be a brave man who questioned the supreme value of this method of treatment both in the rehabilitation of the individual and the prevention of recidivism. Yet figures covering five years, 1919–1923, at the Cardiff Court, quoted in the article by Ruck in (2) already referred to, show, as he says, that: " Probation compared unfavourably [from the point of view of re-conviction] at this time with Home Office Approved Schools, Borstal, and even in some respects penal servitude. . . The figures were incomplete and inconclusive, and in particular the Cardiff probation figures formed far too narrow a basis on which to erect any general conclusions. But they did suggest a possibility that conditional release might be a less effective method of dealing with offenders than reformatory detention, and that an uncritical acceptance of probation as the best method of dealing with young offenders in particular was not warranted." Later figures obtained and analyzed in Criminal Statistics 1938 seem to show that in the case of males " the least successful method of treatment at all age groups is probation under the supervision of a probation officer."

This startling piece of knowledge should not be used to argue the failure of probation; on the contrary, it would seem to point to the fact that probation is used too uncritically by courts. But that the facts should be made available to the large body of lay magistrates as well as to professional judges of all ranks in a series of readable and interesting essays is an example of the value of these publications by the Cambridge department, as indeed is the most stimulating article in (2) by C. D. Rackham, " On the Probation System." As he says: " Many a case has failed on probation because the conditions have never been properly explained. . . . A careful choice then of the cases to put upon probation and a careful explanation of its meaning is the first duty of the magistrates. They should also be careful not to use probation where it is unnecessary, that is, when dismissal or a simple binding-over is all that is required. . . . The fact that an offender has been placed on probation and has then broken down and come before the court a second time is not in itself a reason why he should not be placed on probation again. . . . But the fact that probation has failed in any particular case should always put the magistrates upon their guard, and they should consider very carefully whether they should (metaphorically speaking) change the medicine, or try a further dose of the same."

If courts are comparatively ignorant of the effect upon offenders of the various forms of sentence passed, they are absolutely ignorant of another matter which would seem at least of equal importance. The object of criminal law must clearly be to prevent the commission of crime. Almost all essays and lectures in this field have tended lately to give overriding consideration to the effect of sentence on the individual offender. But this is not the only consideration that a criminal court should have in mind. Sir Alexander Maxwell has given an admirable definition in (6) of what it should consider. " The problem which confronts a court in deciding how to deal with the individual in the dock is often complicated by the necessity of considering not only what will be the effect of their decision on him but what will be the effect on potential offenders. It is the duty of the criminal courts so to deal with persons found guilty of offences that they will be less likely to offend again, and that others will be less likely to commit similar offences. Sometimes both these considerations point to the same method of treatment, but sometimes they do not, and there may be acute difficulty in reconciling the need to deter others with the need for so treating the individual in the dock that he will be most likely to turn over a new leaf." No one knows and perhaps none can ever know how a potential offender is strengthened or weakened in his efforts to resist moving into criminal action by what he learns of how others are treated after conviction. But it is difficult to

avoid the suspicion that the incidence of a widely practised offence like shop-lifting increases in a neighbourhood when a long series of offenders is put on probation and diminishes again after one or two sentences of imprisonment. Certainly upon Circuit one has heard it said that certain sexual offences tend to become more numerous after an assize at which lenient sentences have been imposed for them.

All this is quite unscientific, but the matter needs careful consideration lest an appearance of indiscriminating leniency should increase the number of offenders. There have been some statements upon the topic. For example, the report of the departmental committee on the social services in courts of summary jurisdiction (1936) quoted in the article on Punishment in (1) said: " The impression that a person placed on probation is being let off brings the system into contempt and spreads a false conception of its nature. The disciplinary element in probation needs emphasis, and it should be generally understood that, far from being a sentimental gesture, probation when effectively carried out makes serious demands upon the probationer." Even in 1909 the editor of the Criminal Statistics for that year, quoted in " English Criminal Statistics " in (1), wrote: " Moreover, it can scarcely be doubted that there is a growing indisposition to prosecute for offences of the less serious kind, a growing inclination towards leniency towards first offenders, and growing reluctance to take the trouble to prosecute a thief who, if he is convicted, is likely to be let off with little or no punishment." Perhaps the strongest expression of apprehension in this connection is that of Dr. Stallybrass at the conclusion of his magnificent essay in (1) " A Comparison of Criminal Law in England," where he says: " Judges cannot travel far in advance of public opinion. But it is rather disquieting that the Court of Criminal Appeal should carry to the extent which it has, its insistence on the principle that the punishment should fit the crime. The increase of burglary, housebreaking and so forth of recent years suggests that all is not as it should be. The continual denunciation of short sentences by those best qualified to express an opinion leads one to believe that in the interests of the State greater attention must be paid in the future to the dangerousness of the offender than has been paid in the recent past. Sometimes it would almost seem that the members of the Court of Criminal Appeal have had more regard for the immediate interests of the criminal than for the security of the community, and have allowed their compassion for the accused . . . to carry them further on the course of a perhaps misguided humanitarianism than is either demanded by public opinion or consistent with the welfare of the community." This was written about 1930, and no one could pretend that the incidence of crime is any less today, nor the public mind any easier.

But a hundred years ago the English penal system was about as harsh as may well be imagined, and yet it did not succeed in preventing or greatly diminishing crime. If, then, it can truly be said or even feared that today it is too lenitent to effect the necessary control, what is the correct path to follow? Great claims have sometimes been made by and on behalf of psychologists, occasionally almost suggesting that, if psychiatric treatment could always replace sentence, a crime free millenium would follow. But outside the sphere of sexual offences it is still arguable whether such treatment is effective at all, and there is an even graver objection. Such an argument postulates that every offender is to an extent maladjusted, even ill. Not only is this in the highest degree doubtful, but if accepted it would rob society of that sense of moral disapproval of crime without which, as will be seen later, all efforts to prevent it will be greatly weakened. Dr. Rees, in (8), points out the true though more limited place of the psychologist in criminal administration. " . . . The predominant rôle of the courts is the protection of society, with a necessary policy of deterrence. In order to fulfil this rôle, they must always consider carefully the individual concerned, for if their understanding of the offender leads to true reformation then society is

indeed protected for the future, whereas if wrong treatment is given the protection of the community from further disorder is temporary and superficial. . . . Everyone who is concerned with the protection of society and the maintenance of its rules must be interested in the reasons why individuals transgress these rules, and consequently needs what you may call a psychological point of view with regard to the offender who comes before him." This can be generally agreed, particularly if, as Dr. Rees wishes, " psychiatrists . . . were regarded as experts giving advice to the courts and were not brought in by one side or the other, too often appearing to be there merely to support the efforts of counsel." within the sphere suggested and under the control of the Courts it is clearly contemplated by the Criminal Justice Bill now before Parliament that psychiatric treatment should be used, though the projected section giving power to courts to require mental treatment as a condition of probation seems to require it to be by or under the direction of a duly qualified medical practitioner, which many psychiatrists are not.

Clearly, then, the help of the psychiatrist can only aid the prevention of crime to a limited extent. But in another direction there is considerable hope. It has always been a truism that the best preventive of crime is not deterrent punishment but the certainty of detection. As is said in the article " Punishment " already quoted (1): " It has always been realized that a most effective preventative of crime would be achieved if the potential delinquent could be made to feel that detection and punishment would almost certainly follow the commission of the crime.

" In a system where the machinery for detection and apprehension of offenders is weak the chances of offending with impunity are many, the bolder spirits will take the risk. . . . In the modern system . . . the punishment to be expected, as it is not such as to inspire great fear, will not compensate for any chances of escape which the offender can envisage. It follows that it is essential in modern criminal policy to make provisions for the maximum prospect of detection and apprehension of offenders."

To this end police organization can do, and is doing, much, but everyone knows the peculiar recruiting difficulties at the moment common to all forces in the United Kingdom. Therefore the greatest efforts should be made to mobilize to their assistance the power of public opinion without which in fact there can be no successful enforcement of the criminal law or prevention of crime. The Honorary Secretary of the Howard League, Miss Craven, says at the opening of her article, " The Trend of Criminal Legislation," in (2): " Law-making is like bread-making, and Parliament is the baking oven. A law which is to become a reality, an integral part of the life of the community, must be wanted, consciously and unconsciously, by a solid body of public opinion." Certainly in the face of public indifference or hostility, little success is possible. No proper criminal statistics then can be obtained, as is clear from the very interesting note to the article " English Criminal Statistics," in (1) at pp. 177 to 178. Where offences are created by laws which do not command public support the police have found enforcement extraordinarily difficult. The report of the Royal Commission on Police Powers, 1929, quoted in the same article, says: " A considerable section of the public regards . . . these laws . . . as unnecessary interference with the lives of individual citizens or as penalizing conduct with which it is not the business of the State to deal. Other people, with stricter views, are insistent for the rigid enforcement of such laws, whilst a third, and often the most numerous, section views them with complete indifference. The task of the police in dealing with these offences is thus one of great difficulty. If they attempt vigorous enforcement of the law, public sympathy is apt to be shown to detected offenders, and criticism, which should properly be aimed at the law itself, is directed against the police. If, on the other hand, they adopt a more lenient attitude, another section of the public inveighs against their inactivity or even hints at collusion

or corrupt dealing between the offenders and the police. Whichever policy is adopted, it is the rarest occurrence for any member of the public . . . to be willing to assist in the enforcement of the law. The police are thus deprived of the assistance . . . to which they are entitled and which in other matters they commonly obtain." And finally, where public opinion is not with the law there is always reluctance to prosecute, as is said in so many words in the quotation above from the Criminal Statistics of 1909.

Even instructed opinion sometimes fails to support socially desirable legislation which offends a very strong prejudice. A perfect example is the failure of the system of preventive detention set up by the Prevention of Crimes Act, 1908. As Miss Craven says in the article already quoted: "The second part of the Prevention of Crimes Acts was less successful. It invented the new sentence of preventive detention of the habitual criminal. Parliament . . . amended the Bill so that the new sentence could only be passed as a supplement to a sentence of penal servitude imposed for a particular offence. As a result, judges and criminals were in agreement as to the impropriety of giving 'two sentences for one crime.' Preventive detention has been little used."

How, then, can public opinion best be mobilized? Part of this problem it is suggested must be solved by the courts themselves, by taking considerable care to be seen to consider the welfare of the community equally with that of the offender when deciding on sentence. Otherwise the force of moral indignation against crime will be lost. As Dr. Stallybrass says in his "Comparison of Criminal Law" in (1): "It is a mistake, as Bentham and his followers did, to regard criminal law as independent of morality, to regard, as did the Positivist School, criminals as specimens to be classified and docketed and placed in a museum. Criminal law must be based on the principle that it is right to hate criminals; 'the proper attitude of mind towards criminals,' said one of England's greatest criminal lawyers and judges, 'is not long-suffering charity but open enmity; for the object of the criminal law is to overcome evil with evil.' Criminal law has a close relation to morality. Punishment is not purely imposed as a deterrent; it is in part based upon moral sentiment." And if the Courts charged with the administration of the Criminal Law fail to emphasize their own "moral indignation" this "proper attitude of mind" will be in some degree weakened.

It is at least of equal importance to ensure that legislation is appropriate, in form and timing, to the movement of public sentiment. The inappropriate form of that portion of the Prevention of Crime Act 1908 which set up the system of preventive detention has already been instanced. It is interesting to note that the draft of the Criminal Justice Bill now before Parliament seems to have recognized the reason for this failure, and, in s. 19, proposes sentences of "corrective training" for persistent offenders "with a view to (their) reformation and the prevention of crime," such sentences to be "in lieu of any other sentence." That draft Bill is indeed sprinkled with sections which combine recognition of the tenderness of public conscience with an acceptance of the need (and, it is believed, growing desire) for greater firmness with the disturbing and expensive criminal element. Good examples of this tendency are the present draft sections 17 and 27. The former proposes to set up "detention centres" to which convicted persons between 14 and 21 years of age may be sent instead of to the prisons, as may happen now. This provision seems to defer to the widespread dislike of sentences of imprisonment on very young people, whilst recognizing that probation (as already noted) does not provide an appropriate remedy for many young criminals, particularly in the ages between 16 and 20. The latter gives power to Courts of Summary Jurisdiction who have, with the necessary consents, tried an indictable charge and convicted, to commit the offender (17 years old or over) in custody to Quarter Sessions for sentence if, on learning of his character and antecedents, they consider that greater punishment is appropriate than they can themselves impose. This most neatly compromises between

the powerful (and sensible) advocates of longer rather than shorter sentences where imprisonment is necessary at all (of whom Sir Leo Page is a protagonist) and the general public anxiety lest too wide powers should be conferred on the inferior courts.

Contemporary legislation is not always so happily conceived and worded, as was seen when the recent Act passed to protect the new scheme of petrol allocation was commenced with the odd statement that its purpose was to " create " certain offences. Moreover there exist still a number of statutes which have outlived their day and use and whose very occasional resuscitation serves only to bring the criminal law into contempt, sometimes good natured, sometimes not. It may not be too controversial to instance here some of the extant sections of the Lord's Day Observance Act.

If existing errors are to be corrected and future ones avoided, all concerned with Criminal Legislation and the administration of criminal law, and that is the whole community, cannot have too much knowledge of the science of criminology in all its wide range from the attempt to understand the causes of crime, through the fields of law-making, crime prevention and punishment to after care. Very little is foreign to such studies, as Radzinowicz and Turner recognize in their article in (1) on " The Meaning and Scope of Criminal Science." The publications of the Cambridge Dept. of Criminal Science here listed as numbers (1) to (6) seem admirably calculated to spread this knowledge widely. There are scholarly articles upon particular topics of criminal law, such as, in (1) Dr. Stallybrass' " Public Mischief " and Mr. J. W. C. Turner's " The Mental Element in Crimes at Common Law." There is matter for all who realize (or can be made to realize) how much may be learned by comparison; for example the deeply interesting (3), " An Introduction to Criminal Law in Australia." What English practitioner would not wish to see some simplification of the tangled law concerning embezzlement, larceny as a bailee and misappropriation generally, and will not therefore be both interested in and envious of the path beaten in this direction by s. 142 of the Crimes Act of the State of Victoria? (p. 44). What interesting considerations and perhaps misgivings arise from realizing (p. 53) that The Queensland Justices Act provides that depositions of a child under the age of twelve may be read as evidence on the trial of a person charged with a sexual offence against a child under that age. How valuable to know that in New South Wales, in which state, among others, the Court of Criminal Appeal has power to order a new trial, the Solicitor General has pointed out that an examination of records for the last ten years shows that on such new trials " there is about an even chance of acquittal." There are also hosts of practical and palatable articles of great value to all in judicial positions—lay or professional—such as, in (2), Lt.-Col. Sir V. Henderson's " Approved Schools " and Miss Margery Fry's " The Borstal System," and in (4) Mr. Ronald Howe's " Methods of Crime Detection " and Sir Harold Scott's " The Organization of the Metropolitan Police." And finally, there are articles, perhaps controversial but of high interest, pointing the way to reform, of which perhaps the most weighty and stirring of those under review is that on " The Protection of the Accused " by Mr. A. C. L. Morrison in (4). He contends, and many will agree, that some rules of evidence and of procedure seem to weight the scales of justice not evenly but heavily in favour of an offender, and that, in the public interest, these should be altered. As he says: " So satisfied are most people today that innocent people are never convicted in this country (which is probably near the truth), and that it is indeed better that ten guilty men should escape than that one innocent man should suffer (which is, *pace* Archdeacon Paley, a sound principle), that there is almost a general impression that the acquittal of a certain number of the guilty is good in itself, and shows British justice at its best. Sir Chartres Biron in a Foreword, wrote: ' A witty attorney-general once said that every obviously guilty man who was acquitted placed the administration of law

on a surer foundation. The paradox,' after the tiresome way of such efforts, embodies a great truth. The occasional escape of a rogue is a small price to pay for public confidence in the law.' It is at least open to question whether every acquittal of a guilty man inspires public confidence. The public, to say nothing of the prosecutor and the police, are sometimes a little shocked when a man who seems to ordinary people obviously guilty, escapes conviction. The acquittal may be correct enough, though there have been a few modern instances in which judges have congratulated the accused on his good fortune with the jury. The important point is that ' the occasional escape of a rogue ' should be as rare as possible, and should not be a matter for complacency. Whether, indeed, the law today is in some respects too favourable to the accused is a question which may be worth consideration and discussion."

There is one note of warning to sound. Public opinion, if it is to be of value to the administration and enforcement of criminal law, must indeed be Public and not sectional. Surely the way to promote the knowledge of criminal science is to lay facts, and suggestions based on facts, palatably but without heat before the public. One cannot help feeling that a certain heat in Dr. Mannheim's book " Criminal Justice and Social Reconstruction " (7) has imperilled the balance of what is otherwise a most interesting work, giving evidence of great scholarship and wide research. His general purpose is to examine the criminal law of this country and to suggest changes and reforms which modern knowledge and conditions, he thinks, render necessary. He explains his approach and intention in his Preface: " The spirit of the Criminal Law and its administration should be such as to make this branch of the legal system something like a reliable guide through the chaos of modern society—certainly neither the only nor the most important educational factor of this kind but at least capable of holding its own among the many agencies at work. So far, Criminal Justice has often remained too much behind and out of touch with the progressive elements of social thought, and its approach to the problems of society has been too one-sided to make it a really living force." In the first 54 pages, in which he deals with the Protection of Human Life, this intention is admirably carried out: those whose duty or interest it is to consider Law Reform could only benefit from digesting what is there contained. But a strange conception of the function of criminal law appears in the last sentence of a paragraph dealing with negligence at page 57. " Criminal law has not yet become sufficiently aware of the fact that we are living not in an individualistic but in a mass age, where everything has to be adapted to the use of mass methods. Likewise, it has not yet grasped the profundity of the revolution which Freudian psychology has brought about in our interpretation of the idea of ' negligence.' Formerly a Cinderella of the criminal law, negligence has become one of its pivotal conceptions, which modern legislative technique can no longer afford to neglect. English criminal law is particularly inadequate in this respect, making no provision even for the punishment of wounding or arson committed through gross negligence. Class distinctions and prejudices may account for a great deal of this negative attitude. The conception of criminal negligence is of practical importance mainly for professional men and skilled craftsmen, and they, not the common labourer, would be the chief sufferers if the scope of that conception would be extended. On the other hand, in a legal system which deliberately uses the criminal law for specific political and administrative purposes the difference between intention and negligence will be much less pronounced." If this means that a legal system should use its criminal law for " political purposes," it can only be hoped that the English system will fall short of Dr. Mannheim's ideal. But one cannot escape the feeling that his approach to a reform of the criminal law which protects property has been in this light. A few examples may explain the basis for this apprehension. He writes: " If, however, the thief was more severely punished if he stole a hundred sheep than if he took one or two, this, in most cases, favoured only the owner

of a hundred. Sometimes, it is true, grand larceny may betray stronger criminal tendencies in the thief which justify a sterner sentence; often, however, this does not hold good and the thief may even be unaware of the high value of the stolen article." Is not this an insufficiently considered criticism of the existing law? Even Dr. Mannheim does not dispute that " grand larceny may betray stronger criminal tendencies . . . justifying a sterner sentence." Therefore, surely, there must be a provision for stern sentences where justified; the game must not be worth the candle. But why may not the exclusion of thefts of small value from the " stern sentence " range be interpreted as a protection to the small thief against sentences too great for his criminal status? If, unknown to the thief, large sums are involved in his theft, there would be no " stronger criminal tendencies " upon which to fix a sterner sentence, and the wide discretion enjoyed by both original and appellate courts could and would be exercised in his favour. What, again, does he mean by this passage: " Moreover, the halo of increased protection against theft by which the ' dwelling-house ' used to be surrounded seems somewhat out of place as long as so little was done to make the dwellings of the masses really fit for human habitation?" Because some houses are regrettably bad, shall neither they nor any dwellings be sternly protected by the law against breaking and theft?

At page 120 he defines a very popular modern term—white collar crime—as he understands it. " What, then, is ' white-collar crime?' According to Sutherland, it is ' a violation of the criminal law by a person of the upper socio-economic class in the course of his occupational activities.' Its most general characteristic is violation of trust. It is, as Sutherland points out, more dangerous to society than crimes committed by members of the lower socio-economic class—not only because the financial losses are higher, but especially owing to the much greater damage it inflicts on public morale. When the community is threatened by a crime wave of the traditional type, ' it usually gathers its forces under the leadership of men of the upper socio-economic class for more adequate enforcement of the criminal law according to conventional methods.' Thus the morale of the community is strengthened. White-collar crime, however, destroys mutual trust and community morale. Since criminals of this type mostly belong to the leading class and since members of this class, even if they do not themselves participate in such crimes, are reluctant to attack other members, leadership is lacking in the fight, and there is no effective plan for the enforcement of the law. Because of their social prestige and political influence, white-collar criminals are but seldom prosecuted and even more rarely convicted." But is there evidence to support the bitter last sentence of that passage? It is easy to say, but is it accurate? The same sort of statements are made in Professor Taft's article " Sociological Research in Criminology in the United States " in (4), and of course it is not possible for an Englishman to know how far that article is true of America. But certainly the middle-aged here are bound to wonder, if social prestige is a protection to the well-connected offender, why so large a number of persons prominent in English society have failed to shelter themselves behind it in the last twenty years alone. And, finally (for too much quotation would be tedious without adding to the point) is it quite true to say, as the learned author does at page 242: " There can be little doubt that as long as the lay magistrate dominates the scene no effective machinery will be available to deal with ' white-collar ' criminals." Before writing this has real consideration been given to the method of selection for the office of Justice of the Peace, and has the composition of the many hundred Benches up and down the country been analysed? It would be indeed interesting to know how many of the thousands of J.P.'s of whom these Benches are composed would, by reason of their social and economic background, themselves fall outside Dr. Mannheim's definition of the white-collar class.

These criticisms are not of course intended to question the author's absolute

sincerity, nor his right to express any idea which he holds. But they are deemed necessary to distinguish his book, which is really a powerful and interesting but political disquisition, from the other publications here reviewed, and to weigh its comparative value in the armoury of knowledge with which the problem of crime, its prevention and punishment, must be fought.

LA REVISION DES CONTRATS EN DROIT SUISSE

[*Contributed by* MONSIEUR HENRI DESCHENAUX, *Docteur en Droit, Avocat, Privat-Docent a l'Université de Fribourg, Greffier au Tribunal Fédéral, Lausanne.*]

EN droit suisse comme dans toutes les législations, la règle " pacta sunt servanda " subit, de par la force des choses et les exigences de l'équité, un certain nombre d'atteintes. La loi contient une série de dispositions qui prévoient l'annulation ou même l'adaptation des contrats par suite de circonstances nouvelles. Par-delà la loi, la jurisprudence a admis la résiliation du contrat, et parfois sa rèvision en raison d'événements imprévisibles qui en bouleversent l'économie. Elle a posé à cet égard des conditions plus ou moins déterminées. Elle a de même énoncé certains principes quant aux conséquences d'une résiliation ou aux modalités de l'adaptation aux circonstances nouvelles.

Dans cette brève étude, nous indiquerons d'abord, après un aperçu des cas où la loi règle elle-même l'influence des circonstances nouvelles, la *justification* donnée par la jurisprudence à l'atteinte au contrat pour imprévision.

Puis nous décrirons les *conditions* requises pour que le juge, en dehors des cas prévus par la loi, porte la main sur le contrat régulièrement conclu, c-à-d. en admette la résiliation ou l'adaptation.

Enfin nous examinerons les *effets* de l'imprévision, à savoir la nature et les modalités des modifications apportées au contrat.[1]

I. *Le fondement d'une atteinte au contrat*

Ce fondement réside parfois dans une disposition formelle de la loi. En dehors de ces cas, la jurisprudence a fondé l'intervention du juge sur un principe général dégagé de la législation.

[1] Nos sources seront les suivantes:

(*a*) *Sources législatives :* Le Code fédéral des obligations (cité CO), livre Ve du Code civil suisse (cité CC), et certains arrêtés spéciaux du Conseil fédéral (ACF).

(*b*) *Sources jurisprudentielles :* Nous ne citerons en petit nombre que les arrêts du Tribunal fédéral suisse, l'autorité judiciaire suprême du pays. Les références porteront généralement le nom de la partie recourante, le millésime de l'année, le numéro du volume et la page (p. ex. arrêt Müller, ATF 1942, II, 500 = arrêt du Tribunal fédéral en la cause Müller, 1942, IIe partie du recueil officiel, page 500).

(*c*) *Sources doctrinales :* Nous donnons ci-après l'indication de quelques ouvrages et articles d'auteurs suisses, par ordre chronologique:

R. Stammler : Anderung laufender Verträge, Revue de la Société des juristes bernois, 1922, p. 1 sv. et 49 sv.

A. Siegwart : Der Einfluss veränderter Verhältnisse auf laufende Verträge, Festgabe der Universität Freiburg, 1944, p. 77 sv.

H. Reichel : Vertragsrücktritt wegen veränderter Verhältnisse, Berlin, 1933.

J. Henggeler : Die Abwertung des Schweizerfrankens und ihr Einfluss auf die zivilrechtlichen Verhältnisse, Revue de droit suisse (RDS), 1937, p. 157 a sv.

H. Guisan : La dévaluation du franc suisse et ses effets en droit civil, RDS, 1937, p. 260 a sv.

K. Oftinger : Gesetzgeberische Eingriffe in das Zivilrecht, RDS, 1938, p. 481 a sv.

A. Comment : Les atteintes portées au droit civil par des mesures législatives exceptionnelles, RDS, 1938, p. 215 a sv.

W. Bürgi : Ursprung und Bedeutung der Begriffe " Treu und Glauben " und " Billigkeit " im schweizerischen Recht, Berne, 1939.

H. Merz : Die Revision der Verträge durch den Richter, RDS, 1942, p. 393 a sv.

H. Deschenaux : La revision des contrats par le juge, RDS, 1942, p. 509 a sv.

1°. *Les exceptions légales au maintien du contrat*

Le Code des obligations, aussi bien dans sa partie générale que dans sa partie spéciale, règle une série de cas où le contrat se trouve annulé, résilié ou modifié par suite de circonstances nouvelles.

Il faut mettre à part les cas où c'est *l'attitude d'une partie* qui, après la conclusion du contrat, apporte un trouble à son développement: p. ex. demeure d'un cocontractant, qui donne à l'autre le droit de résilier (art. 95, 107–109 CO), justes motifs de résiliation anticipée lors-qu'ils résident dans un comportement de l'autre partie (art. 269 et 291 CO en matière de bail, art. 352 CO en matière de contrat de travail). Mais il faut remarquer ici que les dommages-intérêts auxquels peut avoir droit la partie qui résilie (art. 107 al. 2 CO), comme d'une façon générale les dommages-intérêts pour inexécution imputable à la faute au débiteur (art. 97 CO), sont susceptibles de réduction en vertu de l'art. 99 al. 3 CO qui renvoie aux règles relatives à la responsabilité pour actes illicites (art. 43/44 CO). Or cette réduction peut se justifier aussi en raison de circonstances nouvelles qui restreignent la responsabilité du débiteur.[2] La créance indemnitaire n'étant qu'un succédané de l'exécution, il y a lieu de voir dans l'abattement opéré en raison des circonstances une forme de revision des contrats (ci-dessous III, 2°).

Sous cette réserve, il n'y a lieu de considérer ici que les cas où des *circonstances extérieures,* indépendantes de la volonté des parties, réagissent sur le contrat conclu.

Nous n'envisagerons pas les dispositions qui règlent les conséquences de la mort d'une partie (par exemple, art. 270, 355 CO) ou de son insolvabilité subséquente (notamment art. 83 CO). En revanche, il faut parler de l'impossibilité, comme aussi de l'illicéité survenante.

En Suisse, l'obligation s'éteint lorsque l'exécution en devient *impossible* par suite de circonstances non imputables au débiteur (art. 119 al. 1 CO). Il n'est par conséquent pas nécessaire ici d'invoquer la " clausula rebus sic stantibus." Dès que, par suite de circonstances objectives—qui peuvent d'ailleurs ne résider qu'en sa personne (vol en ses mains de la chose à restituer)—le débiteur est dans l'impossibilité d'exécuter, il est libéré. Cette impossibilité peut être matérielle (destruction de l'immeuble loué); elle peut aussi être juridique et résulter par ex. du séquestre de la marchandise par les services du ravitaillement, d'une interdiction d'exportation ou d'importation. Dans les contrats bilatéraux, le débiteur ainsi libéré est tenu de restituer, selon les règles de l'enrichissement illégitime, ce qu'il a déjà reçu et il ne peut plus réclamer ce qui lui restait dû (art. 119 al. 2 CO). La disposition citée réserve les cas dans lesquels la loi ou le contrat mettent les risques à la charge du créancier avant même que l'obligation soit exécutée (al. 3). La réserve est importante, attendu qu'elle vise en particulier la vente, pour laquelle les profits et les risques de la chose passent à l'acquéreur dès la conclusion du contrat (art. 185 al. 1 CO). Des règles particulières s'appliquent aussi notamment en matière de contrat d'entreprise (art. 376 à 378).

La législation de crise et de guerre a porté un grand nombre d'interdictions, rendant *illicites* à posteriori nombre de contrats régulièrement conclus. Les dispositions édictées prévoient souvent la nullité des accords qui ne sont pas conformes aux normes nouvelles, voire la modification d'autorité des conventions privées p. ex. en cas de dépassement de prix.[3] Lorsque la législation spéciale ne dispose rien, on admettra tout de même, en règle générale, la nullité de la convention, sauf à limiter cette nullité aux clauses illicites.[4]

Le Code des obligations contient en outre une série de dispositions qui, en raison de circonstances nouvelles, permettent, les unes, la solution du rapport d'obligation (avec ou sans dommages-intérêts), les autres, la modification des

[2] Arrêt *Bourne,* ATF, 1921, II, 391.

[3] ACF du 1 septembre, 1939, concernant le coût de la vie et les mesures destinées à protéger le marché, et les ordonnances du Département fédéral de l'économie publique sur le même objet, notamment l'ordonnance I du 2 septembre, 1939.

[4] Arrêt *Pfister,* ATF, 1921, II, 462.

prestations stipulées. Nous n'en citerons que quelques-unes parmi les plus caractéristiques.

(*a*) Le dépositaire peut rendre le dépôt avant le terme fixé si des circonstances imprévues le mettent hors d'état de le garder plus longtemps sans danger pour la chose ou sans préjudice pour lui-même (art. 476 al. 1 CO).

Typiques sont les droits de *résiliation* pour justes motifs ou circonstances graves dans les contrats de bail (art. 269, 291), de travail (art. 352), de société (art. 545). La loi tient compte ici, d'après l'interprétation donnée par la jurisprudence, non seulement d'empêchements personnels à l'une ou l'autre partie, et en particulier d'une attitude répréhensible, mais aussi d'une modification imprévisible et durable de la situation économique qui rend l'exécution intolérable.[5] L'effet de la résiliation est de transformer, pour l'autre partie, le droit à l'exécution en une créance d'indemnité, laquelle est sujette à réduction conformément à l'art. 99 al. 3 CO (voir plus haut). En matière de contrat de travail, l'art. 353 al. 2 donne expressément au juge la faculté de répartir équitablement le dommage.[6]

(*b*) Dans d'autres cas, la loi accorde à une partie, non seulement un droit de résiliation mais un droit de réclamer la *revision* du contrat.

Chacune des parties à un contrat d'entretien viager peut mettre fin au rapport lorsque de justes motifs rendent sa continuation onéreuse à l'excès; mais le juge peut aussi prononcer la cessation de la vie en commun et convertir l'entretien en rente viagère (art. 527 al. 1 et 2 CO).

Dans le contrat d'entreprise—c'est la disposition la plus caractéristique du droit suisse—si l'exécution de l'ouvrage est empêchée ou rendue difficile à l'excès par des circonstances extraordinaires, impossibles à prévoir (ou exclues par les prévisions qu'ont admises les parties), le juge peut non seulement admettre la résiliation du contrat, mais aussi accorder une augmentation du prix stipulé.

On voit ici le juge modifier le rapport d'obligation lui-même, substituer une prestation à une autre, augmenter un forfait.

(*c*) Il y a enfin des cas où le juge ne peut, d'ailleurs par la nature des choses, que reviser le contrat.

Le preneur d'un bien rural peut exiger une remise proportionnelle du fermage si, par suite d'accidents ou calamités extraordinaires, le rapport habituel du bien est notablement diminué (art. 287 CO).

La peine conventionnelle et le salaire du courtier peuvent être réduits par le juge lorsqu'il les estime excessifs (art. 163 al. 2, 417 CO). Or ce caractère excessif peut résulter aussi de circonstances postérieures imprévisibles.[7]

* * *

Mais là se bornent, pour l'essentiel, les atteintes à l'intégrité du contrat, qui sont formellement prévues par la loi. Le vendeur par ex. qui, par suite d'entraves diverses, de pénurie de moyens de transport, de renchérissement des facteurs de la production, rencontre d'énormes difficultés à livrer la marchandise promise, ne trouve aucun recours dans une disposition légale expresse; il n'est pas moins démuni à l'égard de son acheteur qui prétendrait le payer dans une monnaie complètement dévaluée, si c'est la monnaie du contrat. L'acheteur qui, du fait d'une mesure officielle, ne peut plus réexporter la marchandise commandée, le locataire qui, par suite des événements, ne peut pas exploiter dans les locaux loués son commerce ou son industrie, ou dont les affaires, en raison de circonstances imprévisibles, sont tellement en recul que le loyer stipulé n'est plus du tout en rapport avec elles, semblent également sans protection légale.

2°. *La cause générale d'atteinte au contrat pour imprévision*

La jurisprudence est venue au secours de contractants placés dans des

[5] Arrêt *Rogenmoser*, ATF, 1934, II, 205.
[6] Arrêt *Barré*, ATF, 1918, II, 412.
[7] Arrêt *Hug*, ATF, 1942, II, 169 sv., spécialement, p. 176.

situations semblables. Dans les contrats bilatéraux (au sens le plus large), quand, par suite d'un bouleversement profond et imprévisible des circonstances, le rapport entre les deux prestations s'est altéré au point que la prestation de l'un des contractants ne peut plus être considérée raisonnablement comme l'équivalent de la contre-prestation due par l'autre, le premier est en droit de résoudre le contrat si le second n'accepte pas une solution équitable. Le Tribunal fédéral permet non seulement de résilier le contrat, mais, suivant les cas, de le modifier en réduisant ou augmentant la prestation, afin de rétablir une proportion acceptable quand la valeur de la contre-prestation a diminué ou s'est élevée dans une mesure extraordinaire.

Il est intéressant de voir comment la jurisprudence suisse a justifié cette cause " sui generis " d'extinction ou de revision des contrats pour imprévision. La justification de l'atteinte au contrat peut être cherchée soit dans la volonté des parties, soit dans une règle objective.

(*a*) *Les justifications volontaristes.*—Le Tribunal fédéral a très généralement repoussé l'idée d'une véritable clause tacite (la " clausula rebus sic stantibus " des glossateurs), en vertu de laquelle le contrat ne lierait pas les parties si les circonstances devaient subir une modification essentielle.[8] Il a cependant opéré parfois avec des idées qui procèdent de la " clausula," par exemple avec la théorie de la " Voraussetzung " de *Windscheid,* d'après laquelle le contrat serait lié aux " présuppositions " dont sont partis les contractants, de sorte que si celles-ci sont déjouées, il se produit une lacune qu'il incombe au juge de combler.[9]

La jurisprudence s'est aussi appuyée sur une disposition du Code des obligations relative à l'erreur, l'art. 24 ch. 4, d'après lequel l'erreur est essentielle et permet de résilier le contrat lorsqu'elle " porte sur des faits que la loyauté commerciale permettait à celui qui se prévaut de son erreur de considérer comme des éléments nécessaires du contrat " (Grundlagenirrtum, erreur sur la base du contrat). Cette erreur porte sur des faits contemporains du contrat. Mais si celui-ci n'oblige pas en ce cas, on doit pouvoir appliquer la même règle lorsque, dans la suite, les éléments nécessaires du contrat subissent une modification intolérable pour l'une des parties.[10]

(*b*) *Les justifications objectivistes.*—La jurisprudence a très longtemps cherché à justifier l'atteinte au contrat par l'idée d'impossibilité, assimilant au cas de l'art. 119 CO celui d'une aggravation excessive de l'exécution.[11] Elle paraît maintenant avoir renoncé à cette justification, l'exorbitance n'ayant rien à voir avec l'impossibilité.[12]

Le Tribunal fédéral en a appelé aussi à l'idée de lésion. D'après l'art. 21 CO, en cas de disproportion évidente entre la prestation promise par l'une des parties et la contre-prestation de l'autre, la partie lésée peut déclarer qu'elle résilie le contrat et répéter ce qu'elle a payé, si la lésion a été déterminée par l'exploitation de sa gêne, de sa légèreté ou de son inexpérience. Cette disposition vise la lésion contemporaine du contrat. On a construit là-dessus la notion de lésion postérieure à la conclusion du contrat.[13]

Les règles sur l'enrichissement illégitime (art. 62 sv. CO) ont aussi été appelées à la rescousse. L'industriel qui, en période d'inflation, rembourse avec le prix de quelques livraisons l'emprunt-obligations avec lequel il a acheté sa fabrique s'enrichit sans cause.[14]

[8] Arrêt *Rogenmoser* ATF, 1933, II, 374 et arrêts cités.

[9] Cf. p. ex. l'arrêt *Hüni,* ATF, 1921, II, 317.

[10] Arrêt *Rogenmoser,* ATF, 1933, II, 377.

[11] Cf. p. ex. arrêt *Bourne,* ATF, 1921, II, 399 et arrêt *Rogenmoser* cité à la note précédente. L'idée de libération du débiteur pour *défaut d'identité* de la prestation par suite de circonstances extraordinaires, se rattache à la théorie de l'impossibilité dite économique.

[12] Arrêt *Hug,* ATF, 1942, II, 172.

[13] Arrêt *Rogenmoser,* ATF, 1933, II, 378, *Schweiz. Eidgenossenschaft,* ATF, 1941, I, 277 sv.

[14] Arrêts *Brasserie St.-Jean,* ATF, 1919, II, 355, *Huttinger,* 1928, II, 276.

(*c*) *La justification par l'idée de bonne foi.*—L'art. 2 CC déclare que " chacun est tenu d'exercer ses droits et ses obligations selon les règles de la bonne foi." Et la disposition ajoute que " l'abus manifeste d'un droit n'est pas protégé par la loi." La bonne foi du Code civil suisse est quelque chose de plus que la " bona fides " du droit romain, ou que la bonne foi du droit français. C'est le " Treu und Glauben " du droit germanique, qui ne vise pas seulement la loyauté ou la droiture en affaires, mais exprime l'idée de confiance mutuelle et d'interdépendance des parties.

Ainsi, le principe de la fidélité contractuelle trouve lui-même sa limite dans le principe supérieur de la bonne foi. Or il est contraire à la bonne foi de maintenir les obligations imposées au débiteur par le contrat si les circonstances se sont modifiées au point qu'en échange de sa prestation, il ne recevra aucune contre-prestation ou seulement une prestation dérisoire. Du fait de la réciprocité dans les droits et les obligations, corollaire du " Treu und Glauben," les parties doivent pouvoir compter dans une certaine mesure que leurs légitimes espérances ne seront point déçues. Dans le cas contraire, la solution du contrat ou son adaptation se justifient. La partie qui voudrait s'en tenir strictement au contrat malgré le bouleversement imprévisible des circonstances commettrait un abus de droit.[15]

Cette explication recouvre en réalité tous les autres essais de justification. La " clausula rebus sic stantibus " revient à construire une volonté présumée, hypothétique, qui est celle de deux parties censées être de bonne foi. Si les " présuppositions " ou " représentations " dont sont partis les contractants ne sauraient être complètement déjouées, c'est en vertu de l'art. 2 CC. L'exorbitance n'est qu'une impossibilité morale, dont seules les règles de la bonne foi permettent de tenir compte. L'exploitation dont se rendrait coupable la partie qui veut ignorer les conditions nouvelles n'est pas autre chose qu'un abus de droit. Et c'est l'idée d'abus qui fait apparaître sans cause la prestation de celui qui devrait accepter une contre-prestation privée de la plus grande partie de sa valeur. Aussi bien le Tribunal fédéral ne discute-t-il plus actuellement d'imprévision que sous l'angle des règles de la bonne foi.[16]

II. *Les conditions d'une atteinte au contrat*

On peut ramener à trois principales les conditions requises par la jurisprudence suisse pour que le juge admette la résolution ou la résiliation d'un contrat ou qu'il procède à son adaptation du chef de l'imprévision. Il faut:

1°. que le trouble apporté à l'économie du contrat résulte d'un événement extérieur, imprévisible, qui échappe à la prise des parties;

2°. que cet événement entraîne la rupture de l'équilibre existant lors de la conclusion du contrat;

3°. que le déséquilibre survenant dépasse la mesure du risque assumé par la partie qui demande la protection du juge.[17]

1°. *La causalité d'un événement extérieur imprévisible*

L'événement dont il s'agit doit avoir un caractère supra-individuel, être imprévisible et produire le trouble indépendamment d'une faute du demandeur.

(*a*) *Caractère supra-individuel de l'événement.*—Les circonstances considérées seront non seulement des catastrophes générales comme la crise ou la guerre, mais aussi des événements n'affectant qu'un cercle étroit de personnes, comme des cataclysmes naturels ou des troubles locaux. Il n'est pas nécessaire non plus que les deux parties soient touchées; le demandeur peut l'être seul, p. ex.

[15] Arrêt *Rogenmoser*, ATF, 1933, II, 377. *Schweiz, Eidgenossenschaft*, 1941, I, 277, et les arrêts antérieurs, ATF, 1918, II, 527; 1918, II, 355, 398; 1920, II, 162; 1921, II, 399; 1922, II, 247; 1924, II, 265.

[16] Cf. les arrêts les plus récents, *Hug*, ATF, 1942, II, 169, et *Assortiments Cylindre*, 1943, II, 139.

[17] Cette partie, nous l'appellerons le demandeur—le défendeur étant la partie qui prétend s'en tenir au contrat.

l'industriel dont la fabrique a brûlé.[18] Les faits en question n'ont même pas à présenter les caractères de la force majeure; le cas fortuit est déjà suffisant. En revanche des circonstances personnelles, même fatales, n'entrent pas en ligne de compte ici (maladie, mort).

(*b*) *Imprévisibilité de l'événement.*—La jurisprudence s'inspire de la disposition du droit positif qui admet l'augmentation du forfait de l'entrepreneur en raison de circonstances " impossibles à prévoir " (art. 372 al. 2 CO). Pour juger si un fait est prévisible, il faut prendre pour base l'opinion moyenne des milieux intéressés et la prévoyance communément observée par les hommes d'affaires de la branche. Cependant la simple prévisibilité abstraite ne suffit pas; il faut avoir dû envisager certaines possibilités concrètes.[19] Pour mesurer le degré de prévision requis, il faut se reporter à l'époque où se place la conclusion du contrat.[20]

La mesure de la prévision dépend de la durée du contrat. Dans un marché à court terme, il est plus facile de prévoir les difficultés qui peuvent survenir.[21] Cependant, la jurisprudence admet que, dans les contrats à long terme, les parties doivent tenir compte de fluctuations assez considérables.[22]

Il peut arriver que les parties aient admis dans leurs prévisions qu'un événement, en soi prévisible, ne se produirait pas. L'art. 373 al. 2 CO envisage formellement ce cas pour le contrat d'entreprise. C'est *l'imprévisibilité subjective*. L'événement ayant été rejeté hors des prévisions, est un imprévu le jour où il se produit. La pratique a étendu cette notion à d'autres contrats.[23]

(*c*) *L'absence de faute du lésé.*—La faute du demandeur est de nature à interrompre ou à relativiser la causalité de l'événement perturbateur du contrat. Cette faute suppose qu'on puisse reprocher au lésé de n'avoir pas observé dans les circonstances données la prudence d'un homme d'affaires avisé. La faute première est de ne pas prévoir ce qui était prévisible; on retombe dans la condition traitée sous lettre *a*. Pour les autres fautes, elles sont de toute nature, et il est impossible ici d'en dresser un tableau. Signalons le fait du débiteur qui ne s'y prend pas à temps pour préparer l'exécution, qui en particulier ne s'approvisionne pas assez tôt lui-même.[24] Le défaut d'exécution ponctuel et surtout la demeure ne permettent généralement pas au demandeur d'exciper d'imprévision, quand les circonstances extraordinaires surviennent par la suite.[25] Postérieurement à la survenance des circonstances imprévisibles, les règles de la bonne foi veulent que la partie lésée fasse tout pour empêcher l'aggravation de la situation.[26]

La faute de la partie lésée ne supprimera pas toujours la causalité de l'événement. Il faut procéder à une comparaison entre la puissance des bouleversements extérieurs et la gravité de l'imprudence qui a contribué à provoquer le trouble. Le point a surtout son importance pour la faute d'imprévision.

2°. *La rupture de l'équilibre contractuel*

Le moyen tiré de l'imprévision suppose d'abord qu'au moment où il est invoqué, il y ait encore un *contrat,* c.à-d. que les obligations qui en dérivent ne soient pas encore complètement exécutées. Si tel est le cas, le demandeur ne peut pas, malgré le bouleversement des circonstances, se plaindre d'avoir payé un indû: l'exécution sans réserves de l'obligation prouve que celle-ci a été tenue

[18] Arrêt *Elektrizitätswerke Zürich,* ATF, 1922, II, 366.

[19] Arrêt *Atar,* ATF, 48, II, 119 (renouvellement d'un contrat d'impression en temps de guerre).

[20] Le T.F. a jugé imprévisible l'aggravation de la situation économique en Suisse dans les années 1930, encore que des experts l'aient prévue (arrêt *Rogenmoser,* ATF, 1934, II, 211).

[21] Arrêt *Segessemann,* ATF, 1922, II, 247.

[22] *Nord. Kraftwerke,* ATF, 1921, II, 457.

[23] Arrêt *Bourne,* ATF, 1921, II, 401.

[24] Arrêts *Bourne,* ATF, 1921, II, 400; *Pfister,* 1918, II, 514; *Schlaum,* 1919, II, 42.

[25] Arrêts *Doetschmann,* ATF, 1919, II, 372; *Fraisse,* 1918, II, 71.

[26] *Luzerner Brauereien,* ATF, 1924, II, 264.

pour tolérable. La jurisprudence refuse même de revenir sur les phases accomplies d'un contrat.[27]

Ceci posé, il faut, pour qu'on puisse en appeler à cette loi d'équivalence relative, corollaire des règles de la bonne foi, que le ou les contrats considérés comportent des *prestations réciproques*, et que l'équilibre existant entre ces prestations soit *rompu*.

(*a*) *Les prestations réciproques.*—Il n'y a lieu à modification, en raison des circonstances nouvelles, des obligations contractées que là où *deux* prestations sont en présence. Cela sera le cas dans les contrats synallagmatiques ou bilatéraux parfaits: la vente, le bail, le contrat de travail, le contrat d'entreprise, etc. Cependant le mot prestation ne doit pas être pris au sens étroitement juridique, mais dans un sens large, économique. Ainsi, le remboursement du prêt, qui n'est pas une contreprestation au sens technique, en est une ici: la disproportion qui peut se produire, par suite de la chute des cours, entre la somme prêtée et la somme en espèces semblables offerte en restitution peut justifier une revalorisation de la dette de l'emprunteur. La jurisprudence l'a admis et a donc étendu le régime de l'imprévision aux contrats bilatéraux imparfaits.[28] Mais elle n'est pas allée plus loin. Dans les contrats purement unilatéraux, comme la promesse de garantie, le cautionnement, la donation (sauf les hypothèses légales des art. 249 et 250), l'obligé ne peut pas invoquer la " clausula rebus sic stantibus."[29]

Dans un contrat mixte (p. ex. bail d'appartement avec service de chauffage), il faut considérer comme prestation du bailleur l'exécution des deux catégories d'obligations.[30] Lorsque les parties sont liées par deux contrats distincts, mais dépendants l'un de l'autre, la prestation de chacune comprendra tout ce à quoi elle est obligée par les deux contrats. Dans un contrat de vente à livraisons successives (fourniture de bière, livraison d'énergie électrique), la prestation de chaque partie sera faite de l'ensemble des marchandises livrées ou des paiements opérés.[31]

(*b*) *Le déséquilibre survenant.*—Il doit être considéré dans la personne du demandeur à l'annulation ou à la revision. Le préjudice subi peut consister, pour le débiteur, dans une augmentation de valeur de sa propre prestation (p. ex. l'exécution devient beaucoup plus onéreuse pour le vendeur), ou bien dans la dépréciation de la prestation qu'il reçoit en échange (la monnaie du contrat subit une dévaluation, ou bien l'acheteur n'a plus du tout l'utilité de la chose commandée ou louée).

La rupture du rapport entre les prestations doit s'apprécier eu égard à l'équilibre initial. Si celui-ci était déjà boiteux, il faut que la disproportion ait été aggravée par les circonstances pour qu'on puisse parler d'un déséquilibre.[32]

En règle générale, la jurisprudence n'admet l'intervention du juge dans les contrats que s'ils sont de longue durée.[33] C'est que dans les contrats à court terme, il y aura rarement imprévision. Cependant, malgré le principe énoncé, le Tribunal fédéral ne se dispense pas de vérifier les autres conditions de la " clausula " dans les contrats de courte durée dont l'économie a été bouleversée.

3°. *Le dépassement du risque assumé*

La seule altération du rapport initial entre les prestations ne suffit pas à justifier une atteinte au contrat. La jurisprudence demande que la disproportion

[27] Arrêt *Dampfschiffgesellschaft*, ATF, 1922, II, 253.
[28] Arrêt *Hinchsen*, ATF, 1925, II, 311, et arrêts postérieurs, 1927, II, 78, 1928, II, 317, 1931, II, 370, 1932, II, 125.
[29] Arrêt *Schweiz, Gaslühlicht*, ATF, 46, II, 157 (garantie de dividendes par un tiers).
[30] Dans l'arrêt *Hüni*, ATF, 1921, II, 314, le juge a pourtant isolé les deux parties du contrat.
[31] Arrêt *Nord. Kraftwerke*, ATF, 1921, II, 459.
[32] Arrêt *Rogenmoser*, ATF, 1934, II, 214.
[33] Arrêt *Segessemann*, ATF, 1922, II, 247; *Migros*, ATF, 1936, II, 45.

survenante soit considérable, manifeste, excessive.[34] Le Tribunal fédéral a même exigé, pendant de longues années, que l'exécution fût si intolérable pour le débiteur qu'elle équivalût à sa ruine.[35] Il a maintenant laissé tomber cette exigence,[36] mais l'a remplacée par une autre: il faut que le fait pour l'autre partie de s'en tenir au contrat constitue une exploitation usuraire de la situation difficile dans laquelle se trouve le débiteur.[37] C'est requérir chez le créancier un élément subjectif qui n'est pas impliqué dans l'idée d'abus de droit de l'art. 2 CC. Enfin, pour caractériser le déséquilibre dans les prestations, le Tribunal fédéral a ici ou là posé la condition de l'enrichissement de l'autre partie (ci-dessus, I 2° b).

En réalité, si on la centre sur l'idée de bonne foi, la jurisprudence touchant la disproportion des prestations se ramène à ceci:

Toute partie à un contrat d'une certaine durée, en même temps qu'elle en escompte des avantages, doit s'attendre à des difficultés, à des déceptions, à des pertes. C'est le *risque du contrat*. Si ce risque se réalise, la partie touchée n'en devra pas moins exécuter son obligation. Cependant, si le trouble survenu sort de tout calcul que pouvait faire le demandeur, si le déséquilibre des obligations n'est plus couvert par aucune prévision, le risque est *dépassé*. Le bouleversement qui se produit exige, en vertu des règles de la bonne foi, la libération du débiteur ou du moins un nouvel aménagement des obligations stipulées.

Pour décider si le créancier commet un abus de droit en prétendant réclamer l'exécution, il faut déterminer le risque maximum que le débiteur est censé avoir assumé. La question du risque peut d'abord faire l'objet de *conventions* qui l'admettent, l'excluent ou le limitent. A défaut d'une convention, le risque pris s'appréciera d'après *l'ensemble des circonstances*.

(*a*) *Les conventions sur le risque*.—Dans la mesure où les parties ont déterminé les risques qu'elles assumaient, il n'y a plus de problème de l'imprévision. Tout se ramène à l'interprétation de leurs conventions exclusives ou inclusives du risque, et à l'examen de leur validité du point de vue des principes généraux du droit (question de la lésion).

Les clauses *exclusives* du risque (clause " sans garantie," clauses réservant certaines éventualités telles que interdiction d'exportation, difficultés de transport, perte de l'intérêt à la chose) prévoient la libération du débiteur, un sursis à l'exécution, une augmentation du prix.[38]

Quant aux clauses simplement *limitatives* de la responsabilité, on admet généralement qu'elles n'épuisent pas la protection à laquelle peut prétendre le débiteur; celui-ci peut pour le surplus exciper d'imprévision lorsque la prestation ne saurait plus lui être raisonnablement imposée (dépassement des prévisions de risque).[39]

Le Tribunal fédéral se montre prudent pour admettre une *acceptation* générale du risque. Il n'attribue cette portée qu'à des clauses telles que " quoi qu'il arrive," " Unter allen Umständen." Il n'a pas vu dans la garantie d'une consommation minimum de courant électrique l'assurance que le consommateur exécutera le contrat si sa fabrique vient à être détruite.[40]

(*b*) *La mesure du risque en l'absence de conventions*.—Une série de facteurs entrent ici en ligne de compte. Nous ne pouvons que les indiquer sommairement.

(*aa*) *L'élément spéculatif*.—C'est le grand critère. Dans les contrats qui comportent cet élément, les parties prennent un risque accru et vont jusqu'à répondre de l'imprévisible.

Il en est ainsi naturellement des opérations de bourse ou des opérations analogues.

[34] ATF, 1933, II, 378.
[35] ATF, 1919, II, 398; 1920, II, 162; 1922, II, 247; 1924, II, 264; 1933, II, 304.
[36] Dès l'arrêt *Rogenmoser*, ATF, 1933, II, 377–78.
[37] Même arrêt, p. 378–79.
[38] P. ex. arrêts *Brenner*, ATF, 1919, II, 193; *Schlaum*, 1919, II, 37; *Aarg, Elektrizitätswerk*, 1922, II, 444.
[39] Arrêt *Brenner* précité, p. 199.
[40] Arrêt *Elektrizitätswerke*, ATF, 1922, II, 366.

Un élément spéculatif, mais moins caractérisé, est inhérent aux marchés du commerce de gros. De même aux opérations d'argent.[41] A ce sujet, le Tribunal fédéral a consacré la théorie de la valeur nominale: la dette d'argent est une dette de somme, et non de valeur, en sorte qu'elle peut être acquittée par la remise d'une quantité de monnaie dont la valeur nominale atteint, à l'époque du paiement, le montant de la somme à payer; le créancier court donc le risque d'une dépréciation.[42] Toutefois ce risque se limite aux fluctuations naturelles ou fortuites qui résultent d'un renchérissement des valeurs réelles, de la destruction de biens, de l'appauvrissement général; il ne s'étend pas à une dépréciation démesurée due à des dispositions de l'Etat. Aussi le Tribunal fédéral a-t-il valorisé à plusieurs reprises, après l'avantdernière guerre, des créances en marks.[43] Dans les contrats de longue durée, les parties doivent nécessairement s'attendre à certaines fluctuations; c'est en celà que consiste l'élément spéculatif. Mais, sauf motifs spéciaux, on n'aura pas à tenir compte de fluctuations sensiblement supérieures à celles qu'on a pu observer dans les années qui ont précédé le contrat ou au cours de sa durée elle-même.[44]

Pour le surplus, l'élément spéculatif dépend de l'objet du marché (prestation sujette ou non à fluctuations), de la qualité des parties (commerçants ou simples particuliers), et surtout du but de l'opération. Sous ce rapport, il faut distinguer entre les contrats lucratifs et ceux où le prix est fixé comme une indemnité ajustée à des dépenses effectives.[45]

(*bb*) *La situation respective des parties.*—On présume que la partie économiquement la plus forte prend sur elle un risque plus élevé (le brasseur qui traite avec l'aubergiste).[46] Celle des parties que le contrat favori sait d'emblée sera censée avoir assumé une responsabilité plus grande.[47] La partie déjà désavantagée sera admise plus tôt à se plaindre de l'aggravation ultérieure,[48] à moins qu'elle n'ait spéculé.[49]

(*cc*) *L'attitude des parties.*—Les déclarations et le comportement des parties ont leur importance, même si l'on n'en peut déduire la volonté d'accepter (ou d'écarter) un risque. Il en est ainsi des circonstances contemporaines de la conclusion du contrat, lorsque le demandeur insistait pour que l'opération soit faite.[50] En cours de contrat, lorsque l'aggravation se produit, le débiteur est censé prendre ses risques s'il exécute sans réserves, s'il repousse une offre de résilier, s'il assume de nouveaux engagements.[51]

bouleversement intervenu dans l'économie du contrat possède un droit de *résiliation ou de résolution* et, dans certains cas, un droit de demander la *revision* des obligations stipulées. Ces facultés procèdent de l'idée que le créancier commet

III. *Les modalités de l'atteinte au contrat*

Lorsque les conditions de l'imprévision sont réalisées, la partie victime du

[41] Arrêt *Hüttinger*, ATF, 1928, II, 257.
[42] Arrêt *Hinrichsen*, ATF, 1925, II, 303.
[43] Arrêt précité et ATF, 1927, II, 76; 1928, II, 314; 1931, II, 368.
[44] Arrêts *Weniger*, ATF, 1919, II, 398; arrêt *Hüni*, 1921, II, 314: dans un bail avec chauffage, les tribunaux ont admis comme excessive une augmentation du coût du combustible, dépassant les fluctuations des 10 années précédentes. De même, les prévisions ont été jugées dépassées par la hausse de l'hectolitre de bière de 25 à 31 fr. (*Brasserie de St.-Jean*, ATF, 1919, II, 351) par le recul des recettes brutes du locataire dans un restaurant, de 52% (arrêt *Dampfschiffgesellschaft*, 1922, II, 249).
[45] Distinction à faire entre un contrat de livraison d'énergie électrique et la convention accessoire de chauffage des locaux dans un bail: AFT, 1921, II, 457–58.
[46] Arrêt *Luzerner Brauereien*, ATF, 1924, II, 256.
[47] Arrêt *Nord. Kraftwerke*, ATF, 1921, II, 450.
[48] Arrêt *Dampfschiffgesellschaft*, AFT, 1922, II, 253.
[49] Arrêt *Rogenmoser*, ATF, 1933, II, 214.
[50] Arrêt *Rogenmoser*, ATF, 1933, II, p. 380–81.
[51] Arrêts *Bitzel*, ATF, 1922, II, 452; *Verein Luzern, Brauereien*, 1924, II, 25; *Rogenmoser*, 1933, II, 381.

un abus de droit s'il prétend s'en tenir aux termes du contrat; elles apparaissent ainsi comme la sanction de cet abus.

1°. *L'annulation du contrat*

C'est la première issue à une situation jugée intenable.

(*a*) *Le droit d'annulation.*—La loi elle-même connaît un certain nombre de droits de résiliation pour justes motifs, en matière de bail, de contrat de travail, d'entreprise, etc. (art. 269, 352, 373 CO). Ces " justes motifs " visent aussi, outre le cas de faute de l'autre partie et certaines circonstances personnelles à l'intéressé, l'hypothèse de l'imprévision, avec toutes ses conditions.[52]

Malgré l'absence d'une disposition expresse, la jurisprudence admet un droit semblable dans d'autres contrats, notamment dans la vente avec livraisons sucessives. Le vendeur, pour qui l'accomplissement de sa prestation est devenu intolérable, est fondé à se départir du contrat.[53] L'acheteur qui, par suite de circonstances fatales, ne peut plus faire de la chose l'usage prévu pourra (exceptionnellement) se voir reconnaître le même droit.[54]

Ce droit de résiliation de la partie victime de circonstances imprévisibles, p. ex. du vendeur, sera souvent sans objet en ce sens que l'autre partie, p. ex. l'acheteur, aura renoncé à demander l'exécution effective pour réclamer des dommages-intérêts ou résilier lui-même le contrat.

(*b*) *Les conséquences de l'annulation.*—Dans le cas des droits de résiliation prévus par la loi, la partie qui en use doit indemniser son cocontractant (cf. art. 269 al. 1 pour le bail, 353 al. 2 pour le contrat de travail). Cela est conforme à l'idée qui est à la base de l'imprévision; l'auteur de l'annulation doit compensation à l'autre partie dans la mesure où, selon le principe du risque, il doit prendre sur lui les conséquences du trouble imprévisible.

La jurisprudence n'a pas appliqué cette règle d'indemnisation à d'autres contrats. Ainsi, lorsqu'elle a admis le droit du vendeur de refuser l'exécution effective, le droit de l'acheteur de se départir de son obligation de prendre livraison, elle n'a pas mis d'indemnité à leur charge.[55]

En revanche elle a admis que le vendeur ne pouvait se soustraire, en invoquant l'imprévision, à l'action en dommages-intérêts de l'acheteur pour inexécution.[56] Mais ces dommages-intérêts, succédanés de l'exécution, ont toujours été considérablement réduits.[57]

2°. *La revision du contrat*

C'est à la suite de la jurisprudence allemande que le Tribunal fédéral a admis l'atteinte au contrat par mode de revision. Ce mode n'est pas fondamentalement différent de l'annulation. Lorsque, dans un contrat de longue durée, l'annulation n'a d'effets que pour l'avenir (ex nunc), elle revient à un aménagement de ce contrat.[58] Pour justifier la revision d'un contrat en cours, la jurisprudence a recouru à l'idée que le juge se bornait à restituer la volonté des parties en comblant les lacunes de leurs conventions.[59] Elle s'est aussi autorisée de la disposition expresse de l'art. 373 al. 2 CO qui permet au juge d'augmenter le forfait de l'entrepreneur.[60]

[52] Arrêt *Rogenmoser*, ATF, 1934, II, 211–216.
[53] Arrêt *Brasserie de St.-Jean*, ATF, 1922, II, 355.
[54] Arrêt *Elektrizitätswerke*, ATF, 1922, II, 366 (contrat de livraison d'énergie électrique; incendie de la fabrique).
[55] Arrêts *Brasserie St.-Jean, Elektrizitätswerke*.
[56] Arrêt *Bourne*, ATF, 1921, II, 177.
[57] Cf. ci-dessous lettre *b*, sur la réduction des dommages-intérêts, considérée comme une forme de revision.
[58] ATF, 1933, II, 375.
[59] ATF, 1933, II, 376–77.
[60] Même arrêt, et aussi ATF, 1921, II, 318.

Il faut dire ici brièvement quand il y a lieu à revision, quels sont les modes de revision et quelle est la mesure de la revision.

(*a*) *Conditions particulières de la revision.*—La revision des obligations stipulées sera la plus naturelle dans les contrats de longue durée, où les prestations sont réparties également dans le temps et où il est relativement facile de mesurer leur aggravation; c'est là que les parties désireront généralement le maintien du contrat.[61] Mais la revision peut être indiquée, voire s'imposer dans des contrats à court terme comportant une prestation unique (cas de la dépréciation rapide de la monnaie).

Le Tribunal fédéral pose en principe qu'il n'y a lieu à adaptation des obligations que si les deux parties sont désireuses de continuer le contrat.[62] Si ni l'une ni l'autre des parties ne veut d'une revision, le juge ne peut naturellement y procéder. Mais il faut bien voir quelles sont en réalité leurs intentions. En l'absence même de conclusions subsidiaires formelles, le juge pourra considérer que le demandeur qui plaide la résolution du contrat préférerait encore à son maintien une réduction de ses obligations; que le défendeur qui plaide le maintien du contrat préférerait encore une augmentation de sa prestation à l'annulation du lien contractuel.[63]

(*b*) *Les modes de revision.*—La revision peut porter sur l'obligation de la partie lésée, comme sur celle de l'autre partie. Elle peut consister en une augmentation ou en une réduction de ces obligations, ou encore dans une modification de certaines de leurs modalités. Elle peut viser des prestations en nature comme des prestations en argent, notamment les dommages-intérêts pour inexécution.

(*aa*) *L'augmentation de la prestation.*—L'art. 373 al. 2 CO prévoit l'augmentation du prix forfaitaire dû à l'entrepreneur. Le Tribunal fédéral a élevé la créance de loyer à raison de la hausse du prix du charbon.[64] Il a revalorisé des créances en marks.[65]

(*bb*) *La réduction de la prestation.*—Pour les *obligations de livrer,* la jurisprudence a envisagé une réduction de la quantité à fournir, le prix restant le même.[66] Un arrêté du Conseil fédéral du 14 novembre 1939 sur le séquestre et l'expropriation de marchandises avait prévu que, lorsque plusieurs obligations de livrer existent simultanément et qu'une partie seulement en est suspendue ou éteinte en vertu de séquestre ou d'expropriation, elles sont toutes réduites proportionnellement. La jurisprudence avait plutôt tenu compte de la priorité de commande.[67]

Quant aux *obligations d'argent,* elles concernent ou bien la créance même dérivant du contrat, ou bien la créance indemnitaire qui s'est substituée à la créance d'une chose ou d'un service par suite de la résiliation exercée par le cocontractant.

Le Tribunal fédéral a p. ex. réduit le loyer du preneur, ce qui suppose que celui-ci puisse encore faire de la chose un usage limité, sans quoi seule la résiliation entre en ligne de compte.[68]

La réduction de la clause pénale (art. 163 CO) a aussi été justifiée par des considérations tenant à l'imprévision.[69]

Les dommages-intérêts pour inexécution de l'obligation comprennent en principe tout l'intérêt à l'exécution, le dédommagement complet (art. 269 al. 2 CO). Mais l'idée de l'imprévision amène à réduire la créance indemnitaire dans une mesure équitable, correspondant au risque limité pris par le débiteur (ci-dessous lettre *c*).

[61] Arrêts *Hüni,* ATF, 1921, II, 314; *Dampfschiffsgesellschaft,* ATF, 1922, II, 249.
[62] Arrêts précités. L'art. 373 al. 2 Co ne pose pas cette condition.
[63] Arrêt *Hüni.*
[64] Arrêt *Hüni,* ATF, 1921, II, 315.
[65] Arrêt *Hinrichsen,* ATF, 1924, II, 393, et arrêts cités note 43.
[66] *Nord. Kraftwerke,* ATF, 1921, II, 454.
[67] Arrêts *Kaiser,* ATF, 1917, II, 87; *Brenner,* 1919, II, 198.
[68] Arrêts *Dampfschiffsgesellschaft,* ATF, 1922, II, 252; *Grätz,* 1920, II, 168.
[69] Arrêt *Hug,* ATF, 1942, II, 175–76.

(*cc*) *Autres modifications.*—Elles peuvent porter sur le *lieu d'exécution*. Une telle modification peut être imposée au débiteur si elle n'entraîne pas pour lui des inconvénients sérieux.[70]

L'époque de la livraison peut aussi être changée. Mais l'exécution ne peut être indéfiniment différée, et elle ne peut l'être sans réserves.[71]

(*c*) *La mesure de la revision.*—L'imprévision ne décharge la partie lésée que dans la mesure où la perte qu'elle subit dépasse le risque qu'elle avait assumé. Dès lors, l'adaptation ne sera pas proportionnelle à la perte du demandeur: ainsi, l'augmentation ne sera pas de toute la différence entre le prix stipulé et le prix actuel; la réduction n'aura pas à correspondre rigoureusement à la dépréciation de l'objet. Le Tribunal fédéral déclare que le dommage résultant de l'aggravation des circonstances doit être équitablement réparti entre les intéressés.[72] Cela signifie en définitive que, p. ex., l'augmentation du prix sera seulement de ce qui, dans le prix actuel, dépasse le maximum qu'on pouvait envisager comme possible au moment du contrat; que la réduction du loyer sera simplement proportionnelle au recul du chiffre d'affaires que le débiteur ne pouvait pas du tout prévoir.

Il paraît utile, pour terminer, de mentionner quelques cas d'application de ces principes.

(*aa*) *Augmentation des prestations.*—Dans la cause *S.A. d'entreprises*,[73] la différence entre le coût des travaux au moment de l'établissement du devis et celui calculé au moment de l'exécution était de 53.000 fr. Défalquant de cette somme le bénéfice de l'entrepreneur, tenant compte également de ce qu'une partie de l'augmentation des prix était prévisible, le Tribunal a arbitré à 20.000 fr. le supplément de prix à payer par le maître de l'ouvrage.

Dans la cause *Hüni*,[74] un bailleur avait eu, en 1918, à supporter, pour les locaux loués, une augmentation des frais de chauffage de 4.350 fr. par rapport à 1913. Tenant compte des fluctuations des prix du combustible durant les années précédant le contrat, le Tribunal fédéral a estimé que le bailleur pouvait s'attendre à une majoration de l'ordre de 350 fr. (mesure de son risque). Il a en conséquence mis à la charge du preneur la différence, soit 4.000 fr. Cet arrêt a été critiqué par les auteurs.

Pour la valorisation des créances libellées en marks, la jurisprudence a généralement appliqué les taux de la législation spéciale allemande (30 ou 40%).

(*bb*) *Réduction des prestations et indemnités.*—Dans la cause *Dampfschiffsgesellschaft*,[75] le concessionnaire de la restauration sur les bateaux de la compagnie avait vu ses recettes baisser de 52, 3% par suite de la moindre fréquentation des bateaux et de la diminution des courses. Se fondant sur des expertises, les tribunaux ont fixé à 42, 5% la mesure de l'aggravation dont le concessionnaire n'avait pas à répondre et ont réduit dans cette proportion le loyer de 40.000 fr. qui était échu, soit de 17.000 francs. Ainsi, le risque imputé au concessionnaire n'était plus que de 10% de la diminution des recettes. Le contrat avait, il est vrai, été d'emblée désavantageux pour le preneur qui avait assuré la subsistance du personnel des bateaux pour un prix insuffisant.

Dans le cas *Bourne*,[76] l'acheteur avait dû, par suite de l'inexécution par le vendeur, se procurer à 27 fr. le kilo la marchandise qui lui fût revenue à 9 fr. selon le contrat. Sa perte, correspondant à la différence de 18 fr., s'élevait, pour les quantités commandées, à 77.000 fr. Le Tribunal fédéral a réduit " ex aequo et bono " les dommages-intérêts dus par le vendeur à 25.000 fr. Ce montant

[70] Arrêt *Antony*, ATF, 1918, II, 525.
[71] Arrêts *Antony–Wirth*, 1918, II, 256; 1920, II, 434; *Elektrizitätswerke*, ATF, 1922, II, 369.
[72] ATF, 1921, II, 401.
[73] ATF, 1924, II, 158.
[74] ATF, 1921, II, 314.
[75] ATF, 1922, II, 249.
[76] ATF, 1921, II, 391.

correspond à un prix au kilo de 14/15 fr. Ce qui revient à dire que le vendeur aurait encore dû exécuter le contrat si la marchandise lui était revenue à ce prix. Tel était son risque, celui d'une augmentation de 9 à 14/15 fr. L'acheteur a supporté en fait le dommage correspondant à la différence de 15 à 27.

Dans le cas Grätz (bail d'un immeuble à destination de grand magasin),[77] le Tribunal fédéral a mis à la charge du preneur les 3/4 du dommage causé au bailleur par la résiliation et qui s'élevait à 33.000 fr.

Dans le cas *Rogenmoser*,[78] le bail assurait au propriétaire un avantage exceptionnel; plus tard, au lieu d'un loyer de 150.000 à 170.000, il n'a trouvé preneur qu'à 84.000 fr. La perte de loyer éprouvée par le bailleur du fait de la résiliation était de 1.100.000 fr. Le Tribunal fédéral a ramené l'indemnité due par le locataire à 200.000 francs, soit à moins de 20% du dommage effectif. Il a retenu l'absence de faute grave du preneur, la connaissance du risque par le bailleur, la situation financière difficile du preneur, l'avantage pour le propriétaire de toucher un capital.

* * *

En manière de conclusion, ou peut dire que la jurisprudence suisse, non sans quelques flottements, a élaboré un système de l'imprévision, qui permet au juge de remédier aux conséquences inéquitables résultant pour le débiteur du bouleversement des circonstances, sans sacrifier cependant les principes de la responsabilité individuelle et du respect des contrats.

BRITISH NATIONALITY ACT, 1948

[*Contributed by* Professor E. C. S. Wade.]

I

At the Imperial Conference which was held in London in 1937 General Hertzog on behalf of the South African delegation proposed that the British Nationality and Status of Aliens Act[2] should be amended to confine the meaning of " British subject " to " subject of Great Britain."[3] The argument for the proposal was that each unit of the British Commonwealth should have its local nationality law as Canada, South Africa and Eire already had and that citizens under the law of any member of the Conference should have the common status of British subject.[4] The justification for this proposal lay principally in the international sphere. For certain international purposes States, members of the League of Nations, had need to define their nationals, for example, for candidature for election as judges of the Permanent Court of International Justice, as the International Court of Justice was then called. Each member of the British Commonwealth was a separate unit with its own laws, or at least its own policy, with regard to immigration and deportation; most were already parties to inter-State commercial agreements; some required to give and to receive protection for diplomatic envoys.

[77] ATF, 1920, II, 168.
[78] ATF, 1935, II, 259.

[1] The first part of this article was written before the Bill was debated in either House of Parliament and has been corrected to take account of the final text of the Act. The Bill received the Royal Assent on July 30, 1948. A short account of its parliamentary history is given in the second part. The Bill was drafted to give effect to a general scheme recommended to their Governments by a conference of experts representing the members of the British Commonwealth, together with Eire and Burma, which was held in London in February, 1947. See Cmd. 7326, 1948.

[2] The Act of 1914–1943, referred to hereafter as the British Nationality Act.

[3] J. Mervyn Jones, British Nationality Law and Practice (1947), pp. 237–8.

[4] Summary of Proceedings, Cmd. 5482, 1937, pp. 24–25.

The proposal in 1937 did not, however, result in any agreed action. The common status of the British Nationality Act rested on common allegiance. The status of a British born subject depended upon birth within His Majesty's dominions and allegiance. Now allegiance was the doctrine upon which the British Empire was founded. To abolish common status would mean the end of common allegiance, so argued the Government of the United Kingdom. But it was recognized that there was nothing incompatible with a Dominion enacting its own nationality law for certain purposes to exist side by side with a law of common status for all British subjects. It is that recognition which has resulted in the abandonment of common status by the Act of 1948. Another cause of the change of attitude lies in the problem of the nationality of married women. As far back as the Imperial Conference, 1923, it had been proposed and agreed in principle that power should be taken to re-admit a woman to British nationality in cases where the married state, though subsisting in law, had for all practical purposes come to an end, as in the case of the separated or deserted wife. This proposal never became part of the common status law for the British Commonwealth and failure to agree on this point may be regarded as one cause of the change now proposed which involves the abandonment of common status.

But if the married woman was a contributory cause, the real justification for action lay in the threatened general breakdown of common status which was necessarily incompatible with the legislative independence recognized by the Statute of Westminster, 1931. The principle of common status meant that consultations and agreement between members of the Commonwealth had to precede legislation by any single State, nor was agreement always attainable. Even when it was, long delays occurred before the stage of legislation could be reached. With the extension of the Commonwealth to include India, Pakistan and Ceylon the defects were likely to become stubborn. In fact Canada had already departed from the system by granting in 1946 a Canadian citizenship to exist along with recognition in Canada as a British subject of any person who had that status under the law of any other part of the Commonwealth. Eire had of course long since taken an independent line. South Africa's definition of Union citizenship dates back to 1927 but is consistent with common status.

The history of events since the enactment of the Canadian Act is summarized in the White Paper which was published with the text of the United Kingdom Bill.[5]

> " 5. It appeared to the United Kingdom Government that the question ought to be considered whether the citizenship principle introduced by the Canadian Act should be extended by agreement to the other Commonwealth countries. As a result of consultation with the Governments of these countries a conference of experts met in London in February, 1947, at the invitation of the United Kingdom Government. At this conference there assembled expert representatives from the United Kingdom, Canada, Australia, New Zealand, South Africa, Eire, Newfoundland, Southern Rhodesia, Burma and Ceylon. No representative of India attended, but arrangements were made to keep the Government of India informed of the course of the proceedings. At the conference agreement was reached as to a general scheme which the representatives of each country were prepared (subject to reservations as to certain details) to submit to their respective governments for consideration.
>
> " 6. The United Kingdom Government has subsequently been in correspondence with the Governments of Canada, Australia, New Zealand, South Africa, Eire, Newfoundland, India, Pakistan, Southern Rhodesia and Ceylon, and subject to what is said below with regard to Eire it is believed that legislation on the lines of this Bill will be acceptable to the other self-governing countries of the Commonwealth, and is likely to be followed by legislation on similar lines in many of these countries."

[5] Cmd. 7326, 1948, pp. 2 and 3.

The Act abandons common status by repealing from January 1, 1949, the British Nationality Act, 1914,[6] except ss. 17 and 18 which relate exclusively to the status of aliens. That Act will then cease to be part of the law of the United Kingdom and the Colonial Empire. But the Act is by separate enactment also part of the law of the older Dominions as regards the nationality of natural born citizens; it has also been adopted by them with relatively minor variations as their law of naturalization (Part II).[7] It is also as yet part of the law of India, of Pakistan and of Ceylon as well as of Newfoundland and Southern Rhodesia. Australia and New Zealand have no separate local citizenship law. Canada, South Africa and Eire have already been mentioned as having enacted local citizenship laws, but, as has been seen, only Canada has so far made provision, such as the present Bill proposes for the United Kingdom and the Colonies, to give common recognition to the citizenship laws of other parts of the Commonwealth. Since no Dominion enacted the necessary legislation before the Bill of the United Kingdom Parliament received the Royal Assent, it will be necessary for all (except Canada) to repeal an Act of the United Kingdom Parliament which that Parliament has itself already repealed. In the case of the older Dominions they will repeal their own enactments of similar content to the repealed Act. But as regards India, Pakistan and Ceylon the British Nationality Act, 1914, is still part of the law of those new Dominions by virtue of its original enactment by the Parliament of the United Kingdom until such time as the local legislature enacts another measure. That Parliament, however, can no longer repeal the Act with application to those Dominions which now enjoy independent legislative status under the India and Ceylon Independence Acts of 1947. The position in Southern Rhodesia is different, since that country while enjoying responsible government in practice is not within the Statute of Westminster. Similarly Newfoundland has since 1933 been placed outside the operation of the Statute for the time being. Accordingly s. 34 provides for the British Nationality Act, 1914, to remain in force in these countries until the local legislature otherwise provides. Any of the three new Dominions could, of course, make use of s. 4 of the Statute and request that the repeal of the British Nationality Act be extended to them. It is, however, unlikely that, even in the case of Ceylon, there would be a willingness to surrender the newly-won status of legislative supremacy.

But some of the members of the Commonwealth may not have determined by their own legislation their own separate citizenship status as agreed at the 1947 conference of experts before the end of 1948, when the United Kingdom Act ceases to be law. It may be that one or more of the new Dominions will not give legislative effect to the agreed solution at all. So far (July, 1948) only the Commonwealths of Australia and New Zealand have notified the Government of the United Kingdom of their intention to pass the necessary legislation at an early date. It is then clearly necessary to protect the position of a British subject whose citizenship will not have been ascertained by January 1, 1949. Accordingly s. 13 of the Bill provides that any person who does not become a citizen of the United Kingdom and Colonies, i.e. does not acquire the new "local" citizenship because he is potentially a citizen of another unit of the Commonwealth which is named in clause 1 (3), that is to say, Canada, Australia, New Zealand, the Union of South Africa, Newfoundland, India, Pakistan, Southern

[6] The Act thus remains on the Statute Book as the Status of Aliens Act, 1914.

[7] Dominion of Canada; Naturalization Act, 1914 (R.S.C. 1927, c. 138), which included British nationality, naturalization and status of aliens. This Act was repealed by the Canadian Citizenship Act, 1946.

Commonwealth of Australia; Nationality Act 1920–30 (No. 48 of 1930), which re-enacts the Imperial Act, Parts I and III, and adopts Part II (naturalization).

New Zealand; British Nationality and Status of Aliens in New Zealand Act, 1928 (No. 58 of 1928), which adopts Part II and declares Parts I and III of the Imperial Act to be part of the law of New Zealand.

Union of South Africa; British Nationality in the Union and Status of Aliens Act, 1926; (No. 18 of 1926), which follows the Imperial Act.

Rhodesia and Ceylon, shall remain a British subject without citizenship until one of four events occur: he becomes (1) a citizen of the United Kingdom and Colonies; or (2) a citizen of any of the countries just mentioned; or (3) a citizen of Eire; or (4) an alien. Thus the Act expressly provides for two qualifications for a British subject, namely, citizenship of the United Kingdom and Colonies or of any of the countries just mentioned and secondly, a category of British subjects who are without citizenship, simply because legislation may not have been enacted to give them the local citizenship to which they are potentially entitled. There is the possibility that the status of British subject without citizenship may continue indefinitely. Accordingly the Third Schedule continues in force the present law relating to British nationality in favour of such persons, with three qualifications, of which the most important is that a woman who remains a British subject without citizenship shall not on marriage to an alien cease to be a British subject; this provision gives her the advantages of the new law. A British subject without citizenship is also given the benefit of the new law so far as acquiring citizenship of the United Kingdom and Colonies by registration is concerned (see ss. 6–9).

We may now examine in some detail what provisions take the place of the Act of 1914. The scheme is that citizenship of a unit of the British Commonwealth shall be the title to British nationality (Part I), that is to say, a citizen by virtue of the law of any of the countries of the British Commonwealth—and for this purpose the United Kingdom and Colonies are one country—shall be entitled to the advantages and subject to the duties of a British subject (or of a Commonwealth citizen)[8] in every country of the Commonwealth as enumerated in s. 1 (3). To make the scheme effective outside the United Kingdom and the Colonies will, of course, call for early legislation by the separate Parliaments elsewhere than in Canada. Special provision is made for continuing at the request of the individual concerned certain citizens of Eire as British subjects (section 2). The clause is drafted in such a way as to enable any citizen of Eire to claim retention of the status of British subject on all or any of three grounds, i.e. Crown service under the United Kingdom Government, holding a British passport issued by that Government or by a colonial Government or association by way of descent, residence or otherwise with the United Kingdom or its dependent territories. But such persons do not become citizens of the United Kingdom and Colonies. They remain without citizenship, but are in a separate category from similar persons under section 13 whose position has been discussed above. The provisions of the Third Schedule do not apply to section 2.

Part II creates the new status of citizenship of the United Kingdom and Colonies which is necessary to give effect to Part I so far as those parts of the Commonwealth are concerned. Thus the Colonies become one community with the United Kingdom for citizenship purposes. As in the case of British nationality under the repealed British Nationality Act, citizenship may be acquired, as hitherto, by birth or descent, by registration or by naturalization. It may also be acquired by incorporation of territory, the relevant Order in Council specifying the persons who shall be citizens by reason of their connection with the newly acquired territory.

In view of the importance which has hitherto been attached to the tie of allegiance, more particularly by the Government of the United Kingdom, it is to be noticed that allegiance is no longer mentioned as a condition of acquiring citizenship by birth in the United Kingdom or in a Colony. It is of course implicit from the place of birth and s. 4 expressly excludes, as did the Common Law, the acquisition of citizenship when the alien father of the new born child

[8] To meet objection to the use of the term "British subject," which might be made by certain members of the Commonwealth, a Government amendment (S. 1 (2)) allows the status to be described as that of British subject, or Commonwealth citizen, the terms having identical meaning.

enjoys diplomatic status or is an enemy alien in the United Kingdom or colonial territory in enemy occupation (not necessarily the same enemy State, it would seem, as that of the father). The omission of any reference to allegiance removes doubts that may exist as to the acquisition of citizenship by a child born to members of non-diplomatic civil or military missions during their stay in the United Kingdom and Colonies. There will be regret at the passing of the requirement of allegiance; but it follows from the agreement to recognize separate citizenship laws for each unit of the Commonwealth, that common allegiance is no longer the legal tie it was when the Empire, as distinct from the Commonwealth, was developed. For each member State while its citizens continue to owe allegiance to the common head of the British Commonwealth is now competent to define that allegiance in its own terms. There is, it may be suggested, nothing incongruous in Canada enacting its own law of allegiance; and indeed the form of the oath of allegiance under the Canadian Citizenship Act, 1946, suggests that the formal obligations of a Canadian citizen are wider than those of personal allegiance to His Majesty King George VI. It may well be that the decision in *Joyce* v. *Director of Public Prosecution*[9] would not be followed by the High Court of Australia. Thus, even apart from enactment, the law of allegiance might easily differ in separate parts of the Commonwealth.

The Act introduces some changes in the existing law relating to citizenship by descent (s. 5). The first is consequent on the abandonment of common status. If a child is born in another Commonwealth State to a father who is a citizen of the United Kingdom and Colonies, the child acquires his father's citizenship by descent, but he will not transmit that citizenship to the next generation; the reason for this is that after the second generation such a person may normally be expected to take the citizenship of the country in which he was born. Children born in foreign countries have had a chequered career in the law of nationality. The Act varies the solution reached by the amendment made in 1943 to the British Nationality Act, 1914. The Act of 1943 allowed British nationality to be transmitted to the second and subsequent generations born in foreign countries, subject to (i) registration of birth at a British Consulate and (ii) the assertion on attaining the age of 21 of the desire to retain British nationality. The latter requirement is now to be dropped. Nor is s. 13 of the British Nationality Act, 1914, which made loss of British nationality consequent on the acquisition of alien nationality by naturalization or other voluntary and formal act, repeated in the present Act. So a citizen of the United Kingdom and Colonies who is naturalized in a foreign country will not in future automatically lose his citizenship; he will, however, be free to renounce it, as can any citizen of the United Kingdom and Colonies who has dual citizenship within the Commonwealth or has foreign nationality, except in time of war when renunciation will be subject to the consent of the Secretary of State (s. 19).

Another matter which calls for comment is the absence of any express reference in Part II of the Act (excepting in the transitional provisions, s. 14) to the retention of citizenship by a female British subject on marriage to an alien. It is well known that this change in the law was one of the chief points which called for examination by the Conference whose recommendations resulted in the Bill. The change has been brought about simply by the repeal of s. 10 of the British Nationality Act whereby the wife of an alien was deemed to be an alien; this restores the common law rule. There is thus no necessity for a substantive provision to secure what is an outstanding change in the law, namely, the retention by a single woman on her marriage to an alien of her status of British subject by virtue of her citizenship of the United Kingdom and Colonies. It does not follow that other members of the Commonwealth, if they accept the change, will not enact it by a more direct provision than a repeal section and it may be regretted that the technique of draughtsmanship has resulted in this obscure enact-

[9] [1946] A.C. 347.

ment of the change in the United Kingdom law. In the transitional provisions, s. 14 is necessary in order to restore in the case of mixed marriages the wife's status as a British subject; the section does not expressly make her a citizen of the United Kingdom and Colonies, but it follows from s. 1 that she can only enjoy that status by virtue of such citizenship or that of another unit of the Commonwealth, unless s. 13, which has been seen provides for nationality without citizenship, applies to her particular case.

There is one provision in this Part of the Act which may be regarded as reactionary. It also results from the repeal of s. 10 of the British Nationality Act under which the wife of a British subject was deemed to be a British subject, which was not the common law rule. S. 7 provides that the Secretary of State may " cause to be registered as a citizen of the United Kingdom and Colonies (*a*) an alien woman who has been married to a citizen of the United Kingdom and Colonies, (*b*) . . . upon application made in the prescribed manner by the woman . . .". In this connection it is interesting to note that the Canadian Act requires the alien wife to apply for a certificate of naturalization in the ordinary way but only one year's residence in Canada is required of the wife. The Act requires registration, but not a certificate of naturalization. It would appear then that it lies in the absolute discretion of the Secretary of State whether or not he decides to register as a citizen of the United Kingdom and Colonies an alien woman who has married such citizen. Moreover such a woman may be deprived of her citizenship under section 20 (2), though she is not exposed to the wider grounds which apply to revocation of certificates of naturalization (s. 20 (3) and (4)). Thus the Home Secretary is to be endowed by statute with the same powers to prevent man and wife living together as are exercised today by the Government of the U.S.S.R. He can refuse the woman registration as a citizen and can refuse her admission as an undesirable alien or in certain circumstances deport her as such to her country of origin. No doubt the purpose of the authorities in seeking this power is to prevent British youths being tricked into marriage by women undesirables from the Continent. Nevertheless this power to separate husband and wife, which is subject to no appeal, is a deplorable one to entrust to any official in a country where the tradition of family life is still, presumably, of value. From the legal point of view one may envisage the nice point of a wife petitioner in a divorce case being denied access to the courts of the country of her husband's domicile by the Aliens Branch of the Home Office.

The above is one example of the category of citizenship by registration, as distinct from naturalization. Another new class which acquires citizenship by this means consists of citizens of the other Commonwealth States and of Eire who may wish to become citizens of the United Kingdom and Colonies. There are two grounds for application so to be registered (*a*) twelve months' residence in the United Kingdom (or in the Colonies or dependent territories) *or* (*b*) service under His Majesty's Government of the United Kingdom (s. 6 (1)). Registration is a matter of entitlement (not discretionary at the choice of the Secretary of State), subject only to compliance with the prescribed formalities for making application. The right also extends to women married to citizens of the United Kingdom and Colonies who are citizens of another Commonwealth State or of Eire or who are British protected persons. The inclusion of British protected wives obviates the requirement of naturalization which would otherwise be necessary for such persons and puts them in a more advantageous position than alien wives to whom, as has been seen, the Secretary of State has an absolute discretion to refuse registration.

The Act does not refer expressly to the Secretary of State for Home Affairs and relies instead on the old formula of the unity of the office of Secretary of State; this was also done in the case of the British Nationality Act. While no doubt it is intended that the administration of the Act shall continue with the

Home Office there is nothing to prevent its transfer to the Foreign Office or the Colonial Office. Indeed in so far as the Bill in several places, e.g. ss. 8 (2) and 10 (2) provides that the functions of the Secretary of State shall be exercised by the Governor of a Colony, Protectorate or Trust Territory it may well be the intention that responsibility for that part of the administration of the nationality law shall be the function of the Secretary of State for the Colonies.

There was issued with the text of the Bill a White Paper summarizing its main provisions.[10] A feature of this is the Appendix which takes the form of detailed explanation notes on the particular clauses. It is not proposed in this article to discuss further the important transitional provisions (now ss. 12 and 13 and the Third Schedule) which are amply illustrated there, but, with the permission of the Controller of H.M. Stationery Office to reproduce in full that part of the Appendix which explains those provisions. The whole Appendix is a useful innovation which, it may be hoped, will be followed by other Departments in explanation of the technicalities of proposed legislation.

II

A short account must be added to explain the parliamentary history of the new law. The Bill was introduced in the House of Lords in February, 1948, but the second reading in that House was not taken until May and the Committee stage was only completed on June 21. The Bill then went to the Commons in a form which differed in important respects from the original text. Two of the major amendments were carried against the Government. Both of these were rejected by the Commons and the Lords at the end of the session accepted the position with the result that the Bill passed into law on July 30, 1948, in substantially the form in which it was first introduced in the Lords. There was, however, one important Government amendment to Clause 1 which was accepted by both Houses, namely that a person entitled by virtue of citizenship of any country within the Commonwealth, excluding Eire, to the status of British subject should be known either as a British subject or as a Commonwealth citizen, titles which are to have an identical meaning in this Act or any other future or past enactment or instrument (s. 1 (2)).[11] The purpose of the alternative is to remove any distaste for reciprocal legislation on the part of any member of the Commonwealth to whose people "subject" may imply subjection and "British" subordination to another race. Another Government amendment (now s. 3 (1)) limits the criminal liability of a British subject (or a citizen of Eire) who is not a citizen of the United Kingdom and Colonies for offences hitherto punishable in the United Kingdom (or Colonial territory) when committed outside the United Kingdom (or Colonial territory) by *any* British subject. The limitation is that such persons shall only be punishable here for those criminal offences committed elsewhere for which an alien can be punished here and, in the case of an act or omission done in a Commonwealth State or in Eire the act or omission would be an offence if that country were a foreign State. Thus for example the limitation does not apply to treason, but the wording of the sub-section is such that murder is apparently excluded since a murder committed by an alien in a foreign State cannot be punished here. Murder, however, was the example given by the Lord Chancellor in moving the amendment as one of the crimes for which any British subject was triable here, no matter whether it was committed abroad. The only exception to this limitation is that offences under the Merchant Shipping Acts committed by a member of any of the States of the British Commonwealth who is a Master of a British ship can be punished here.

The Lords' amendments which the Government asked the Commons to reject were:

(1) a proposal that the particular status of the people for whom the United

[10] Cmd. 7326 of 1948.
[11] See page 71 above.

Kingdom Parliament legislates should be described as " British subjects of the United Kingdom and Colonies." The legal objection to this lay in the use of the same language to describe both nationality within the Commonwealth and membership of the unit to be known as the United Kingdom and Colonies which membership qualifies for Commonwealth nationality. Politically the Government urged that it would be inconsistent with equality of status if the people of one unit qualified for commonwealth nationality by virtue of being British subjects, while in all the others the test was to be local citizenship. Logically the Government's argument is difficult to controvert, but the Opposition argued successfully in the Lords that to the people of the colonies a citizenship shared with the people of the United Kingdom would be a meaningless innovation and that allegiance as subjects of the British Crown was the only intelligible common title. In the Commons they described the new citizenship as " an artificial legal category to define an involuntary residue " without homogenity or special community of interest.

(2) Another Lords' amendment was to omit what is now s. 2 of the Act which provides for the continuance of certain citizens of Eire as British subjects. Implicit in this section is the recognition by the Parliament of the United Kingdom of the secession of Eire by the elimination from the status of British subject or Commonwealth citizen of all her inhabitants who do not give notice in writing to the Home Secretary of the United Kingdom Government of their claim to remain of that status, a claim which may be made as of right at any time.

APPENDIX

Clauses 12–13 and the Second Schedule (now s. 12–13 and the Third Schedule of the Act) are transitional provisions for determining the citizenship of persons who are alive on the commencement of the Act and possess British nationality. The purpose of these provisions may be summarized as follows:—

(A) To select from the sum of British subjects those who because of their associations with the United Kingdom and Colonies should be made citizens of the United Kingdom and Colonies.

(B) To prevent persons who do not come under (A) and whose status will depend upon the enactment of a citizenship law by another Commonwealth country from losing their British nationality in the interim period between the commencement of the United Kingdom Act and the enactment of a citizenship law by the other country.

(C) To enable existing British subjects who do not eventually become citizens of a Commonwealth country to retain their status as British subjects by making them citizens of the United Kingdom and Colonies.

As regards (A), the following existing British subjects will be citizens under clause 12:—

(1) Persons born or naturalized in the United Kingdom and Colonies (subsection (1) (*a*) and (*b*)) or born in a protectorate, protected State or United Kingdom trust territory (subsection (3)).

(2) Persons born outside the United Kingdom and Colonies (whether abroad or in a Commonwealth country) of a father born or naturalized in the United Kingdom and Colonies (subsection (2)).

(3) Persons who derive British nationality from a more remote ancestor, e.g., from a grandfather born in the United Kingdom, if they have no nearer connection with a Commonwealth country (subsection (4)).

These categories harmonize with clauses 4 and 5, and in addition there are provisions for persons who became British by annexation of territory (subsection (1) (*c*), and for women who have married persons who become or would but for their death have become citizens under this clause (subsection (5)).

In addition to these categories there will be some British subjects of remoter ancestry, living, e.g., in the British Commonwealth, who although their fathers and grandfathers were born outside the United Kingdom and Colonies have none the less maintained close associations therewith, intend to make their ordinary residence therein and will wish to become citizens thereof. As they will not be able to register under clause 6, provision is included in subsection (6) of clause 12 for their discretionary registration if they apply before the 1st January, 1950.

As regards (B) and (C), the position is that two Commonwealth countries, viz., Canada and Eire, have enacted citizenship laws. ' Others may follow suit in 1948, but

there will probably be some countries which will not have enacted the necessary legislation when the United Kingdom Act comes into force on the 1st January, 1949. Some countries, besides Eire and Canada, have passed Acts on citizenship rights, but they are not comprehensive citizenship laws and ought not to be so regarded. Consequently, clause 31 (8) includes a definition of a citizenship law which will permit the United Kingdom Government at the request of a Commonwealth country to declare when a citizenship law has taken effect. This will remove any doubt as to what law is a citizenship law and the date of its operation. On the basis that some countries will not have legislated by the beginning of January, 1949, special provisions have been included to keep alive the British nationality of persons potentially citizens of other countries whose status will not then have been ascertained, until their status can be determined by reference to the citizenship law of the country or countries with which they appear to have a connection (clauses 13 (1) and 31 (7)). If at that stage they are found not to have become citizens of any such country, they will become citizens of the United Kingdom and Colonies in order to prevent their losing British nationality and becoming stateless (clause 13 (2)). Their position in the meantime will be governed by the provisions of the Second Schedule.

The following examples indicate the general effect of clauses 12 and 13.

Examples (a) and (b) cover men and unmarried women

(*a*) A British subject born in a foreign country whose father was born in a foreign country and whose grandfather was born in the United Kingdom and Colonies will be a citizen of the United Kingdom and Colonies.

(*b*) A British subject born in a foreign country (i) whose father was born in a Dominion, or (ii) whose father was born abroad and whose grandfather was born in a Dominion, will only become a citizen of the United Kingdom and Colonies if he does not become a citizen of the Dominion where his father in case (i) or his grandfather in case (ii) was born.

Examples (c) and (d) cover married women.

(*c*) A woman married to a citizen of Dominion X who herself was born abroad and whose father was born in Dominion Y will only become a citizen of the United Kingdom and Colonies if under the citizenship laws of Dominions X and Y she does not become a citizen of either Dominion.

(*d*) A woman born in Dominion X of a father born in Dominion Y who herself married first a citizen of Dominion Z and secondly on his death a citizen of Dominion O will only become a citizen of the United Kingdom and Colonies if she does not become a citizen of any of the Dominions named. (N.B. If one of her husbands would but for his death have been a citizen of the United Kingdom and Colonies at the commencement of the Act she would become a citizen of the United Kingdom and Colonies under subsection (5) of clause 12.)

RECENT CONSTITUTIONAL DEVELOPMENTS IN THE BRITISH COMMONWEALTH

[*Contributed by* Professor K. C. Wheare.]

At the beginning of 1944 Professor Frank R. Scott, of McGill University, published an article entitled "The End of Dominion Status."[1] Shortly stated, his argument was that "Dominion status . . . has evolved into complete national independence. As a term descriptive of the States Members of the Commonwealth, the word 'Dominion' is therefore obsolete and confusing. . . . It should be abandoned and s. 1 of the Statute of Westminster ought to be amended accordingly".[2] In Professor Scott's view, since "Dominion" had been used to describe Canada, Australia, New Zealand, South Africa and Newfoundland before they were fully self-governing and independent, and indeed described communities with widely differing degrees of self-government, it was incorrect to retain the word to describe communities which enjoyed complete national independence; it was as incorrect and confusing as it would be to describe an adult as an adolescent.

It is interesting to consider what force there is in this argument. It is based partly upon history. But history provides conflicting usages. It is clear that,

[1] 38 *American Journal of International Law* (January, 1944), pp. 35 ff. Considerably re-written, it was republished in 23 *Canadian Bar Review* (November, 1945), pp. 725 ff.

[2] 38 *American Journal of International Law*, pp. 46–7.

though " Dominion " was used to describe communities which, in law and in practice, were not fully self-governing, it was used also to describe completely autonomous communities. The classic statement of 1926 about equality of status, spoke of " the position and mutual relation " of " Great Britain and the Dominions " and described them as " autonomous communities, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs ".[3] And as Professor Scott implies, the word " Dominion " was adopted in the Statute of Westminster, 1931,[4] to describe South Africa and the Irish Free State to whom full legislative autonomy was being granted, as well as Australia, New Zealand, Canada and Newfoundland, who, at their own request, were receiving a restricted legal competence. Yet, he could argue, this use of the word to describe both the fully self-governing communities and those with limited legal powers was a compromise and that the nearer the other Dominions came to the status of South Africa and the Irish Free State, the more the term became out of date and inaccurate. The Irish anyhow never liked the word, with its suggestion of the grown-up daughter nation; Ireland was not a daughter of Britain but a mother country of the Dominions and a sister kingdom of Britain.

But the force of Professor Scott's argument can be tested better by a study of the events which have succeeded the publication of his article rather than by those which preceded it. Has recent history proved to be on his side? The advance to " complete national independence " has certainly proceeded. Within the confines of the Statute of Westminster itself a fuller use of the powers potentially available there has been made. Already when Professor Scott wrote in 1944 Australia had, by an Act of 1942,[5] adopted ss. 2–6 of the Statute which, in common with New Zealand and Newfoundland, she had been reluctant to accept in 1931. One result of this adoption, which was made retrospective to September 3, 1939, was that the Colonial Laws Validity Act, 1865, no longer applied to laws made by the Parliament of the Commonwealth, whose powers now extended to the repeal or amendment of any Act of the United Kingdom Parliament in so far as it was part of the law of the Commonwealth.[6] Moreover, no Act of the United Kingdom Parliament passed after September 3, 1939, was to extend to the Commonwealth as part of the law of the Commonwealth unless it was expressly declared in that Act that the Parliament and Government of the Commonwealth had requested and consented to the enactment thereof.[7] Yet with all this acquisition of legislative autonomy, Australia like Canada maintained intact the legal basis of its Constitution as it had existed before the passing of the Statute.[8] This refusal of the fullest legal autonomy—the result of the desire to preserve the supremacy of the Constitution in a federal or quasi-federal system—might mean that, on Professor Scott's argument, Australia and Canada could still be called " Dominions." They lacked in law " complete national independence."

But since Professor Scott wrote in 1944, New Zealand, so long considered to be the ideal daughter nation, reluctant to leave her mother's side, has, after some hesitation, acquired full legislative autonomy, outdistancing at a bound, in strictly legal terms, Australia and Canada. About a year after Australia had adopted ss. 2–6 of the Statute of Westminster in 1942, it was announced, in the Governor-General's speech to the New Zealand Parliament, on February 23, 1944, that a similar adoption was to be undertaken in New Zealand.[9] But nothing was done for nearly four years. In the meanwhile at least two interesting books appeared in New Zealand discussing the consequences of adoption.[10] Then in

[3] Cmd. 2768 p. 14.
[4] 22 & 23 Geo. 5, c. 4.
[5] No. 56 of 1942; assented to on October 9, 1942.
[6] Statute of Westminster, s. 2.
[7] Statute of Westminster, ss. 4 & 9 (3).
[8] Ibid. ss. 7, 8 and 9.
[9] *New Zealand Parliamentary Debates*, vol. 264, p. 7.
[10] A. E. Currie, *New Zealand and the Statute of Westminster, 1931:* J. C. Beaglehole (Ed.) *New Zealand and the Statute of Westminster.*

November, 1947, the Parliament of New Zealand[11] passed the Statute of Westminster Adoption Act[12] by which ss. 2–6 of the Statute were to apply to New Zealand as from November 25, 1947, the date upon which royal assent was given to the Adoption Act. This alone, however, would not have given New Zealand complete legislative independence. She would have acquired the powers which, as described in the previous paragraph, Australia acquired, but like Australia also, she had asked when the Statute of Westminster was passed, that the legal basis of her constitution should remain unaltered, that nothing in the Statute should be deemed to confer upon the Parliament of New Zealand any power to repeal or alter the Constitution of New Zealand otherwise than in accordance with the law existing before the commencement of the Statute.[13] This safeguarding of the New Zealand Constitution proceeded from no federal considerations, for New Zealand is a unitary state. It arose from pure conservatism and satisfaction with the existing position.

In 1947 opinion had changed. Legislation had been introduced by the Leader of the Opposition to abolish the Legislative Council, the second chamber of the New Zealand Parliament.[14] The question then arose whether such an amendment of the Constitution was within the powers of the New Zealand Parliament and it is fairly clear that it was not. The Constitution of New Zealand was contained in the New Zealand Constitution Act, 1852,[15] and a power to amend all but fifteen sections of this Act was conferred by the New Zealand Constitution (Amendment) Act, 1857.[16] But s. 32 of the Constitution Act, 1852, which provided for a bicameral legislature, was one of these fifteen entrenched clauses. In these circumstances it was decided, on the initiative of the Prime Minister, not only that ss. 2–6 of the Statute of Westminster should be adopted but also that, since the adoption of the sections left the position of the Constitution unchanged, the United Kingdom Parliament should be asked to pass an Act to relieve the New Zealand Parliament of the restrictions remaining, by the Act of 1857, upon its powers to amend the Constitution. The request of New Zealand was acceded to by the Parliament at Westminster which passed the New Zealand Constitution (Amendment) Act on December 8, 1947,[17] and thereby removed all restrictions upon the legislative competence of a community which still describes itself officially as " the Dominion of New Zealand."

The procedure adopted in attaining the passage of this United Kingdom Act merits a little attention. With the adoption of ss. 2–6 of the Statute by the New Zealand Parliament, there applied to New Zealand thenceforth the rule of construction embodied in s. 4 of the Statute that no Act of Parliament of the United Kingdom thereafter passed should extend to New Zealand unless it was expressly declared in the Act that New Zealand had requested and consented thereto. But what is meant by " New Zealand "? Is it the Government or the Parliament of New Zealand or both? This question had been raised in Australia in 1931 when the provisions of the Statute of Westminster were being prepared and Australia had decided that so far as it was concerned, the request and consent referred to in s. 4 should be the request and consent of the Parliament and Government of the Commonwealth and this rule was inserted in s. 9 (3) of the Statute. No other Dominion asked for any similar provision to be inserted in the Statute at that time. This meant that in 1947 " New Zealand " was still a vague term. The point was accordingly dealt with in the Adoption Act, where it was provided, in s. 3 (1) that the request and consent required in s. 4 of the Statute shall be made and given by the Parliament of New Zealand and not otherwise. It was in

[11] The principal parliamentary discussion is found in the *Debates*, vol. 279.
[12] No. 38 of 1947.
[13] Statute of Westminster, s. 8.
[14] See the *Debates*, vol. 277.
[15] 15 & 16 Vict., c. 72.
[16] 20 & 21 Vict., c. 53, s. 2.
[17] 11 & 12 Geo. 6, c. 4.

pursuance of this requirement that the New Zealand Constitution Amendment (Request and Consent) Act[18] was passed by the New Zealand Parliament asking that legislation in the terms of a scheduled Bill, should be passed to remove restrictions upon its power to amend the Constitution, and it was upon the authority of this Act that the request and consent of New Zealand is recited in the preamble to the United Kingdom Act.

It may be added that the New Zealand Constitution (Amendment) Act, 1947, is only the second Act of the United Kingdom Parliament which has been passed under the terms of s. 4 of the Statute of Westminster, with its legal requirement of a declaration of request and consent. The first was His Majesty's Declaration of Abdication Act, 1936, in so far as it extended to Canada.[19] This is not to say that since the passing of the Statute of Westminster in 1931 no legislation has been passed by the United Kingdom Parliament to extend to the Dominions. On the contrary such legislation has been passed, but it has consisted either of measures which extended to Australia and New Zealand before they adopted ss. 2–6 of the Statute,[20] or of amendments to the British North America Act,[21] which, by the express wish of Canada, lie outside the terms of the Statute and still extend to Canada in virtue of the Colonial Laws Validity Act.[22] It is proper to mention that, whereas in law these measures did not require any declaration that they had been passed with the request and consent of Australia, New Zealand or Canada, in practice such request and consent were always obtained; it would indeed be contrary to constitutional convention for the legislation to be enacted without it.

There is one further point of interest in the enactment by the Parliament of the United Kingdom of the New Zealand Constitution (Amendment) Act, 1947. It would appear to be the first amendment it has made so far to the Statute of Westminster. S. 8 of the Statute had said *inter alia* that nothing in the Act should be deemed to confer any power to repeal or amend the Constitution Act of New Zealand otherwise than in accordance with the law existing before the commencement of the Statute. The Act of 1947 removes this restriction upon the competence of the Parliament of New Zealand, and in so doing may be said to amend, by implication, so much of s. 8 of the Statute as referred to New Zealand.

While New Zealand attained " complete national independence " in the legislative sphere, a similar emancipation occurred in India, Pakistan and Ceylon through the passing by the Parliament at Westminster of the Indian Independence Act,[23] and the Ceylon Independence Act.[24] Burma, too, achieved her freedom by the passing of the Burma Independence Act,[25] but as she chose to exercise that freedom outside the Commonwealth, the terms of her statute do not require fuller discussion here. It is interesting to note, however, that, so far as the Parliament of the United Kingdom is concerned, autonomy inside or outside the Commonwealth is equally independence; the only difference lies in whether or not the autonomous Communities recognize the King. Thus the Indian and the Ceylon Independence Acts provide that from an appointed day His Majesty's Government in the United Kingdom have no responsibility for the Government of the Territories of India, Pakistan[26] or Ceylon;[27] the Burma Independence Act

[18] No. 44 of 1947.
[19] 1 Ed. 8, & 1 Geo. 6, c. 3, preamble, para. 2.
[20] Examples are the Whaling Industry (Regulation) Act, 1934 (24 & 25 Geo. 5, c. 49), the Emergency Powers (Defence) Act, 1939 (2 & 3 Geo. 6, c. 62), the Army and Air Force Annual Act, 1940 (3 & 4 Geo. 6, c. 18), the Prize Act, 1939 (2 & 3 Geo. 6, c. 65).
[21] The British North America Acts of 1940, 1943 and 1946 (3 & 4 Geo. 6, c. 36, 6 & 7 Geo. 6, c. 30, 9 & 10 Geo. 6, c. 63).
[22] Statute of Westminster, s. 7 (1).
[23] 10 & 11 Geo 6, c. 30.
[24] 11 Geo. 6, c. 7.
[25] 11 Geo. 6, c. 3.
[26] s. 7.
[27] s. 1 (2).

not only provides that from an appointed day Burma shall be an independent country but adds that it shall neither form part of His Majesty's Dominions nor be entitled to His Majesty's protection.[28]

At the risk of a digression from the theme of " complete national independence " and its effect on the term " Dominion status," it is perhaps worth while to discuss the method by which this full autonomy has been conferred upon these new members of the Commonwealth and to compare it particularly with the terms of the Statute of Westminster. There are indeed many points of interest to the constitutional lawyer in such a comparison.

A few years ago, if one were asked by what legal procedure India, for example, might be given a status equal to that of the United Kingdom and the Dominions, the simple unreflecting answer might have been that all that was wanted was to insert the word " India " in s. 1 of the Statute of Westminster, whereupon India would have become entitled to the full powers which the Statute confers. But in fact, further reflection might have shown what experience has revealed that the matter could not be dealt with as simply as that. Quite apart from the intricacies which the partition of India brought about and for which a special Act of Parliament was required, the terms of the Statute of Westminster were not entirely appropriate for India. One object of the Statute, it may be recalled, was to repeal, so far as the Dominions enumerated in s. 1 were concerned, the Colonial Laws Validity Act, 1865,[29] which had declared that any colonial law repugnant to an Act of Parliament extending to the Colony was void and inoperative to the extent of such repugnancy,[30] and enacted also the rule of construction that an Act of Parliament should be deemed to extend to a Colony if it was made applicable to a Colony by express words or necessary intendment.[31] Now the Colonial Laws Validity Act did not apply to India[32] and therefore so much of the Statute of Westminster as repealed the Colonial Laws Validity Act[33] was not appropriate. Again, it was evidently desired that the powers of reservation and disallowance be completely abolished so far as India and Pakistan were concerned but the Statute of Westminster did not make such a complete repeal,[34] although it conferred power which could have been used to effect such a repeal.

Though it is clear that a simple application of the Statute of Westminster to India would not have been adequate and although similarly the position in Ceylon was complicated by the necessity for legislation to deal with miscellaneous transitional matters, there is to be found both in the Indian and in the Ceylon Independence Acts a good deal that could be described as " lifted " from the Statute of Westminster. In the case of India, although the Colonial Laws Validity Act itself did not apply, the rules about repugnancy which it contained had been embodied in legislation and were applied by the courts. It was necessary, therefore, to remove the same sort of obstacles in the way of complete autonomy for India and Pakistan as existed for South Africa or New Zealand, say, or for Ceylon—a Colony to which the Colonial Laws Validity Act did apply.

First of all, then, it was necessary to remove the rule that the laws of India, Pakistan or Ceylon were void for repugnancy to Acts of the United Kingdom Parliament extending to them and to declare positively that their legislatures could repeal or amend such Acts. The Statute of Westminster did this for the Dominions in s. 2 (2). The words of s. 2 (2) of the Statute are enacted in s. 6 (2) of the Indian Independence Act. For Ceylon the resemblance to the Statute is even closer because it was necessary also to repeal the Colonial Laws Validity Act; and there is found in s. 1 of the First Schedule to the Ceylon Independence

[28] s. 1 (1).
[29] 28 & 29 Vict., c. 63.
[30] s. 2.
[31] s. 1.
[32] ibid.
[33] s. 2 (1) of the Statute.
[34] It repealed certain powers of reservation or its equivalent in the Merchant Shipping Act, 1894, and the Colonial Courts of Admiralty Act, 1890.

Act the words of both s. 2 (1) and s. 2 (2) of the Statute of Westminster. But notice one difference between the wording of the Indian Independence Act on the one hand, and the Ceylon Independence Act and the Statute of Westminster on the other. In the Indian Act power is conferred on the legislatures of India and Pakistan to pass valid laws repugnant to " the provisions of *this* or any existing or future Act of Parliament of the United Kingdom,"[35] and to repeal or amend any such Act so far as it is part of their law. In the Ceylon Act, as in the Statute of Westminster, the powers conferred relate to " any existing or future Act of Parliament."[36] This raises a controversy. Does the difference in wording amount to anything? Does it mean that Ceylon cannot amend its Independence Act, just as, it has been maintained, the Dominions cannot amend the Statute of Westminster? Is the Independence Act or the Statute an " existing " Act of Parliament? If it is—and the case for this view seems sound—why was it thought necessary to include " this " in the Indian Independence Act? If " this " was put in to resolve doubts for India and Pakistan, why was it not done for Ceylon also? Is some limitation intended upon Ceylon's legislative competence? These questions have aroused some discussion in Ceylon. It may not console the people of Ceylon to know that the difference is probably due to nothing more than a difference of draftsmen.

With the rule about repugnancy out of the way it was necessary for Parliament to substitute a new rule of construction for the old rule that an Act extended to India or Ceylon if it was made applicable thereto by express words or necessary intendment. The Statute of Westminster had dealt with this matter in s. 4 and had made the criterion a declaration in an Act that a Dominion had requested and consented thereto. This provision commended itself to Ceylon and is found word for word[37] in s. 1 (1) of the Ceylon Independence Act. India and Pakistan have chosen to follow the words not of s. 4 of the Statute of Westminster but of s. 2 of a South African Act, the Status of the Union Act, 1934,[38] in which it was declared that no Act of the Parliament of the United Kingdom passed after the date on which the Statute of Westminster received the royal assent should extend to the Union unless extended thereto by an Act of the Parliament of the Union. This is an additional—but not necessarily a conflicting—rule of construction by which judges in South Africa must determine whether an Act of Parliament of the United Kingdom extends to the Union. India and Pakistan have adopted this rule—and this alone, so that their judges have but one rule to apply—and have made it even more precise. S. 6 (4) of the Independence Act provides that no Act of Parliament of the United Kingdom passed " *on*[39] or after "—not just " after "—the appointed day shall extend to India or Pakistan unless extended thereto by their legislatures.

One further restriction which the Statute of Westminster has removed from the legislatures of the Dominions is their alleged lack of power to legislate with extra-territorial effect. This was accomplished in s. 3 of the Statute. This same provision finds itself in the Indian Independence Act, s. 6 (1) and in the Ceylon Independence Act, First Schedule, s. 2. Finally the Statute of Westminster had removed, by the terms of its ss. 5 and 6 certain requirements for reservation or its equivalent found in the Merchant Shipping Act, 1894, and the Colonial Courts of Admiralty Act, 1890. India and Pakistan, as already noted, obtained a full repeal of all powers of reservation, including these, in the Indian Independence Act, but Ceylon was content to receive what the Dominions had received in the Statute and accordingly the terms of ss. 5 and 6 of the Statute are enacted in ss. 3 and 4 of the First Schedule to the Ceylon Independence Act. The Ceylon

[35] s. 6 (2). My italics.

[36] Ceylon Act, First schedule, s. 1. Statute of Westminster, s. 2 (2).

[37] Not quite. It speaks of Acts of the United Kingdom Parliament passed " on or after " the appointed day, where s. 4 of the Statute said " after " the commencement of the Statute.

[38] No. 69 of 1934.

[39] My italics.

parliament none the less has full power to abolish reservation entirely, if it chooses to do so.

From this brief survey it will be seen that the emancipating provisions of the Statute of Westminster—that is to say ss. 2–6—find their place substantially in the Indian and the Ceylon Independence Acts, although the method by which they have been embodied differs. In the Ceylon Act it has been thought expedient to attach the equivalent of ss. 2, 3, 5 and 6 of the Statute to the Act as its First Schedule, while the equivalent of s. 4 of the Statute is found in s. 1 (1) of the Act. In the Indian Act the emancipating sections are all in the Act itself, ss. 2 (2) and 3 of the Statute appearing as ss. 6 (1) and (2) of the Act, while ss. 5 and 6 of the Statute are swallowed up in the wider powers of s. 6 (3) of the Act. S. 4 of the Statute is replaced, in s. 6 (4) of the Act by the words of the South African Status Act, s. 2. Indeed the Indian Act owes much to the Status Act and breathes its spirit as much as, if not more than that of the Statute of Westminster.

Two further points, selected from many that present themselves to the constitutional student as he examines these Independence Acts, may be briefly mentioned. The first is raised by the terms of s. 7 (2) of the Indian Independence Act which runs: " The assent of the Parliament of the United Kingdom is hereby given to the omission from the Royal Style and Titles of the words ' Indiae Imperator ' and the words ' Emperor of India ' and the issue of His Majesty for that purpose of His Royal Proclamation under the Great Seal of the Realm." This subsection fulfils, so far as the Parliament of the United Kingdom is concerned, the obligation assumed by the United Kingdom and the Dominions in 1931 that, " inasmuch as the Crown is the symbol of the free association of the members of the British Commonwealth of Nations, and as they are united by a common allegiance to the Crown, it would be in accord with the established constitutional position of all the members of the Commonwealth in relation to one another that any alteration in the law touching the Succession to the Throne or the Royal Style and Titles shall hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom." This declaration, it should be emphasized, is based upon constitutional convention; it has no legal force. It was approved by the Imperial Conference of 1930 and affirmed by the Parliaments of all the Dominions in the address in which they prayed for the enactment of the Statute of Westminster, and it was affirmed finally by the Parliament of the United Kingdom in the preamble to the Statute of Westminster, where it appears as para. 2. The rule has been brought into operation twice only since 1931—in 1936 when His Majesty's Declaration of Abdication Act[40] was passed, providing *inter alia* for an alteration in the law touching the succession to the Throne,[41] and now in 1947–8 when an alteration in the Royal Style and Titles was involved. On June 22, 1948, the Royal Proclamation was issued after " full discussion and legislation by the Dominions."[42]

Are India, Pakistan and Ceylon bound by this constitutional convention, concerning changes in the Royal Style and Titles? It seems apparent that Ceylon is bound by the convention for, with the coming into force of full autonomy in Ceylon, an agreement was made between Ceylon and the United Kingdom, in which, *inter alia,* Ceylon declared its readiness to adopt and follow the resolutions of past Imperial Conferences.[43] The intention of the agreement clearly was to bring Ceylon fully into the enjoyment both of the rights and duties of other members of the Commonwealth. It is understood, however, that Ceylon, which assumed its full autonomy on March 4, 1948, was not in fact asked to give the assent of its Parliament to the proposed change. The position of India and Pakistan is obscure. They were not members of the Imperial Conference—the

[40] 1 Ed. 8, c. 3.
[41] s. 1 (2).
[42] These are the words of the Prime Minister, Mr. Attlee, in answering a question in the House of Commons on July 1, 1948. 452 *H. C. Deb.*, 5s., 2379.
[43] Cmd. 7257, Appendix II.

India which was admitted to the Imperial Conference in 1917 is not the India of today—and, even if they had been, the resolutions that were adopted on this topic applied to Great Britain and the Dominions alone. Nor do they appear to have adopted, as Ceylon has done, the resolutions that might apply to them. Yet it is reasonable to assume that, since India and Pakistan have accepted the status of self-governing members of the Commonwealth, these rights do in fact apply to them. Be that as it may, it would appear that the assent of the Parliaments of India and Pakistan to the change in the Royal Title was not sought or obtained.

The remaining point of interest is raised by the provisions of ss. 6 (1) and (6) of the Indian Independence Act which state that the legislatures of India and Pakistan shall have " full power to make laws " and that this power " extends to the making of laws limiting for the future the powers of those legislatures." Here is a nice point for those who like to argue about the nature and attributes of a sovereign parliament. It is generally agreed that the Parliament of the United Kingdom is a sovereign parliament and as such *cannot* make laws limiting its powers for the future. Evidently it was not desired by those who spoke for India and Pakistan that their legislatures should be sovereign in the sense in which the United Kingdom Parliament is sovereign. Nor, it would seem, in the sense in which the Parliament of Ceylon is sovereign. Before the passing of the Ceylon Independence Act, the Ceylon legislature could bind itself or its successors by virtue of the fact—to choose no wider ground of principle—that the Colonial Laws Validity Act, 1865, which applied to Ceylon, provided in s. 5 that every colonial legislature had power to alter its constitution provided that such laws were passed " in such manner and form as may from time to time be required by any . . . colonial law for the time being in force in the said Colony." The effect of this provision was that colonial legislatures could bind themselves or their successors.[44] The Ceylon Independence Act repealed the Colonial Laws Validity Act so far as Ceylon was concerned and with this repeal disappeared any argument based upon s. 5. And indeed it is difficult to think of any other argument by which it could be maintained that the Ceylon legislature now has a power to bind itself or its successors. The same would seem to be true of New Zealand and South Africa,[45] and on the same grounds. Australia and Canada are in a different position, as federal states in which the legislatures are limited by the Constitution, and to this extent at any rate the Colonial Laws Validity Act still applies.

After this excursion into the development of " complete national independence " within the British Commonwealth in the last couple of years, what view can be expressed upon Professor Scott's contention that as a term the word " Dominion " is obsolete. It can be seen that in New Zealand, India, Pakistan and Ceylon the fullest freedom has been achieved in the conduct of public affairs. Yet by a curious paradox the use of the word " Dominion " has been extended, not limited. The Indian Independence Act creates, in its own words, " two independent Dominions " to be known respectively as India and Pakistan and it refers throughout to these new states as " Dominions." This is something of a surprise for if the word " Dominion " is objected to by the European members of the British Commonwealth, how much more likely is it that the Asiatic peoples would reject the term. Historically indeed the Dominions were grown up daughter nations, or perhaps in the case of South Africa and Canada, daughter-in-law nations. At a pinch, if Ireland was to be included, they were sister nations. But they could be claimed in some way to be within the British family. India and Pakistan might legitimately have argued therefore that historically the term did not fit their case. In fact they appear, on the evidence of the Independence Act, to have been ready to accept the word " Dominion." Ceylon has done the same. In the years since Professor Scott wrote three new " Dominions " have been added to the Commonwealth.

[44] *Att.-Gen. for New South Wales* v. *Trethowan*, 1932, A.C. 526.

[45] The Appellate Division of the Supreme Court of South Africa expressed this view in *Ndlwana* v. *Hofmeyr*, 1937, A.D. 229.

Yet a little reflection seems to show that time may be on the side of Professor Scott's argument. At the very time when India and Pakistan were accepting the name " Dominion " the government of the United Kingdom announced that in future the Secretary of State for Dominion Affairs would be known as the Secretary of State for Commonwealth Relations, and the Dominions Office as the Commonwealth Relations Office.[46] Their action seemed to anticipate the day when " Dominion " with its suggestion of grown up daughters in a British family would cease to be regarded as appropriate, and they therefore dropped both " Dominion " and " British." Henceforth it would be possible to speak of India and Pakistan, of Australia and New Zealand, of Canada and South Africa, and above all of the United Kingdom[47] equally as " members of the Commonwealth," each possessing equally " member status." This idea of a common status was taken further by the Parliament of the United Kingdom when it included in the British Nationality Act of 1948 a provision that the term " Commonwealth citizen " could be used as equivalent to " British subject."[48]

Canada, for so long regarded as the inventor of the term " Dominion " to describe a self-governing colony, and known—though without legal warrant in the British North America Act, 1867,[49]—as "the Dominion" of Canada, also took a step in 1947 to remove the word from circulation. In new letters patent[50] issued constituting the office of Governor-General, the word " Canada " replaces " Dominion of Canada " or " Dominion " which had found a place in the former letters patent.[51] The word " Dominion " has in fact seldom been used by French Canadians; they prefer the term " Confédération "; they call the " Dominion-Provincial Conference " the " Conférence Fédérale-Provinciale."

This movement may gain strength. It is perhaps well to remember how little " Dominion " is used already in the Commonwealth to describe members individually. South Africa is " the Union," Australia is " the Commonwealth," India and Pakistan may well be each a " Union," Ceylon and New Zealand need no other names. It is in fact only in the term " Dominion status," used to describe the position of the members of the Commonwealth other than the United Kingdom, and in the phrase " the Dominions," used to describe these members collectively, that " Dominion " has had great currency. And it is to this use that Professor Scott objects.

It seems obvious that if any member of the Commonwealth dislikes the term " Dominion status " as a description of its position, it should be encouraged to get rid of it if it can think of a better. At the same time it may be submitted that, from what has been set forth in this article, " Dominion " has been associated in the last few years with as full a measure of " complete national independence " as could be imagined. Some independent members of the Commonwealth have been content to accept the name and have given no indication that they regard it as " obsolete." Others have thought differently. It will not matter if members of the Commonwealth give themselves different names—Dominions, realms, commonwealths, kingdoms. But not republics? Is the monarchy an essential symbol of the association of members in the Commonwealth? Here indeed is raised an argument about the nature of the Commonwealth—something much more fundamental than an argument about what you call yourself inside the Commonwealth. Here is the question to which, in the next year or two we shall seek an answer. If it is indeed " the end of Dominion

[46] 439 *H. C. Deb.* 5s., 1320. The announcement was made on July 2, 1947; The Indian Independence Bill was not presented to the House of Commons until two days later.

[47] One of Professor Scott's objections to " Dominion " is that " it has never been applicable to the United Kingdom." 38 *American Journal of International Law*, p. 47.

[48] 11 & 12 Geo. 6, c. 56.

[49] s. 3 of the Act provides that the provinces " shall form and be one Dominion under the name of Canada."

[50] Issued September 8, 1947, and in effect on October 1, 1947.

[51] The new and old documents are printed in 7 *University of Toronto Law Journal*, pp. 475 ff.

status," is it going to amount to more than pouring the old wine into new bottles? Is it new names for old things? Or, if it is " the end of Dominion status," is it also to be the end of the Commonwealth? Perhaps by the time this article appears in print the meeting of Commonwealth Prime Ministers in London in October, 1948, may have contributed an answer to this question.

FRENCH CRIMINAL LAW STUDIES

Études de Science Criminelle et de Droit Pénal Comparé. 1945. Librairie du Recueil Sirey, Paris. 418 pp. No price quoted.

Revue de Science Criminelle et de Droit Pénal Comparé. 1947, parts 1, 2, & 3; 1948, parts 1 & 2. Librairie du Recueil Sirey, Paris. No prices quoted.

THESE publications, issued under the direction of a most distinguished committee which includes Messieurs Louis Huguenay, H. Donnedieu de Vabres and Marc Ancel, are the envy of an English criminal lawyer. There are, of course, journals published here which deal solely with criminal matters, but few if any written in so beautifully economical a style nor with so wide, so European an outlook.

It is not possible in the space available to consider in any detail all the various articles contained in the volume of *Études* and the five parts of the *Revue*. But a note on the general plan adopted by the publication committee and notices of a few of the essays of greatest general interest may be useful.

Each volume begins with a series of essays by various hands on matters of criminological interest. The topics chosen are quite general, and have no connecting thread. The remainder of each issue, amounting in space to about half, is devoted to a series of notes or very short articles, somewhat like the notes of cases gathered in the first few pages of each part of the *Law Quarterly Review*. The ambit of interest is, however, very much wider. Besides " Chronique de Jurisprudence," which consists mainly of notices and criticisms of actual decisions, and " Chronique Législative," which details changes in the criminal code, with or without short explanations of their effect (which two headings are found in every issue), there appear from time to time a " Chronique Pénitentiaire," giving most interesting accounts of the changes in law and practice in France in matters of penology, a " Chronique de Police," dealing with developments in all fields of police work and, under the title " Informations et Variétés," a series of short notices on topics as diverse as the abolition of the death penalty in Soviet Russia, English prison reform, the cinema and juvenile delinquency (evidently an international as well as an old favourite), the fifth conference of the Inter-American Bar Association and a sketch of the Court for the Trial of minors in Greece. There are also book reviews ranging over an equally wide field. These excellent notes and articles should enable any French student of the criminal law to keep abreast not only of developments in the domestic criminal sphere but of the major European trends in criminal law and penology.

The longer articles seem to have been chosen with the same end in view. Obviously, from the great space devoted to the matter in the volume of *Études*, juvenile delinquency is in the forefront of contemporary French problems. There is a long study by Professor Pierre Bouzat, of the University of Rennes, of methods of treatment apparently novel when the article was written. It is partly an account of certain " centres de rééducation " set up specially for the treatment of juvenile delinquents. These seem much like Borstal institutions in general method and object, but not in so organized and developed a stage. One of the principal weaknesses noted is the failure to select the types to be allotted to any particular centre so that unsuitables or irreconcilables do not find themselves flung together. This was one of the main handicaps of Borstals in their early years, until the important classification system was adopted. The author's

observations at Belle-Ile, Saint Maurice and Saint Hilaire are of absorbing interest. When he turns to theory, he remains of equal interest but it is impossible not to feel that his idealism leads him to be a little impractical. One of the methods he urges most strongly is the division of such centres into a number of groups consisting of not more than eight or ten boys: these groups should be led by young men—he suggests for the purpose scoutmasters in their early twenties—who are to share the life and work of their charges, without distinction of condition, night and day through the 24 hours. From this direction and example the learned author expects satisfactory results because he envisages the whole group as a microcosm of the family and social group in which the young delinquent would live and move outside the centre in normal life. His leaders would require, he writes, the qualities of normal parents. It would seem fairer to say that they would need the qualities of archangels. The mixture of wisdom and devotion necessary to acceptance of such a life through the period of re-education of even one delinquent group is unlikely to be found often either among young men in their twenties or anywhere in the community. Even if the personnel could be found, would any State be justified in allotting so many of its best to this one field? Moreover, the scheme robs the centres of their chance of finding leadership in the body of delinquents themselves, and the true success of Borstal has been its way of transferring responsibility on the trainees through the gradual months of their treatment. It is possibly a fair criticism of M. Bouzat's theories that he tends to overestimate the intelligence of the delinquents with whom the centres will have to deal. For example, he thinks that a short address on some abstract moral topic could usefully precede each day's work. He suggests that a " mot d'ordre quotidien " should be announced—" confiance ou fraternité ou franchise ou honnêteté "—and spoken of for not more than ten minutes. Workers amongst even nondelinquent (and therefore possibly more attentive) youths may well doubt the impression upon their minds of any address at all on an abstract topic. Moreover his belief that a quiet individual talk will effectively put an end to sexual indulgences of various kinds in such institutions seems a trifle naïve. But the essay as a whole is both informative and inspiring.

Next, Hélène Campinchi (avocat of the Cour d'Appel, Paris) writes on the new Law of Juvenile Delinquency of July 27, 1942. It is most interesting to discover that France has somewhat lessened the protection that mere youth afforded in the law of 1912 to offenders. In that law there was an irrebuttable presumption of criminal irresponsibility up to the age of 13. This is swept away and replaced by a rebuttable presumption that all delinquents up to the age of 18 are amenable only to measures of " protection and correction " and not to the ordinary sanctions of the criminal codes. This presumption can however be easily displaced by the facts of any particular case, leaving those between 16 and 18 years of age guilty of " crimes ou délits " and those under 16 guilty of " crimes " subject to the ordinary criminal sanctions. Moreover, the requirement, existing before 1942, that those between 13 and 18 who had committed offences must be proved to have acted wilfully (avec discernement) before they became liable to ordinary criminal punishment is dropped. This piece of French realism, similar to the lowering here of the age for Borstal treatment from 23 to 21 and the reintroduction of police uniform into juvenile courts has not passed without criticism. In the next article M. Marcel Boitard discusses it further, and regrets what he considers a recession from more liberal standards still applicable elsewhere in Europe. An interesting new development he mentions is the creation of " observation centres " for juvenile delinquents. Young offenders are to be sent to these after their guilt is established but before sentence. The object is to study their whole background, social, physical and psychological, so that the court concerned can pass appropriate sentence in the light of the full report before it. The idea is magnificent, but it involves the detention of the

offender in a centre for a period of months before report. The expense of this and the deprivation of liberty meanwhile are unlikely to appeal here. Nevertheless such reports ought to prevent some of the mistakes in sentence which are inevitable after the more superficial enquiries alone open to English Courts.

The last essay in the series by M. Jean Pinatel of the Ministry of the Interior, which deals with the effect of the Law of July 27, 1942, on " l'éducation surveillé," ranges over the developments in that field since 1912, with particular emphasis on the increasing scope given to psychiatric treatment.

Indeed, as appears from a short article by the same authority in Part 1 of the *Revue* for 1947 (section " Chronique Pénitentiaire ") the French are beginning to give great prominence in every penal establishment to a medico-psychological service, of which interesting details are given.

Prison reform is engaging as much attention in France as in this country. M. P. Amor (Directeur de l'Administration Pénitentiaire au Ministère de la Justice) writes interestingly about it in the same part. The full and educative use of time during sentence is realized to be the best hope of reducing recidivism, but, as here, the complete development of plans is terribly handicapped by old, unsuitable, overcrowded buildings which in these difficult times cannot be rebuilt. Even so, special arrangements are made for the education of young criminals between the ages of 18 and 22, and a start is being made with technical education to equip prisoners for employment on release. An after-care organization is in its successful and growing infancy, such as exists here at present only for those released from Borstal sentence.

Among the more general articles the most fascinating, perhaps, is that on the Nuremberg Trial by Prof. Donnedieu de Vabres (*Revue*, 1947, Part 2), himself of the Tribunal. The judgment of the Tribunal, says the learned author, " affirmed the supremacy of the individual point of view over the collective point of view. What resulted was the primacy of conscience over the requirements of discipline. When a superior order requires the commission of a crime, especially of any act so qualified by the Law of Nations, disobedience is a duty." That was exactly the point. But how far the doctrine appeals to authority in any modern State is speculative. Prof. de Vabres himself notes that this passage of the judgment " has received the criticism that it tends to upset the discipline necessary for the preservation of States " and adds " such a rule should only be applied in the future with prudence and understanding." To some it may seem that whether there is any future will depend on whether mankind prefers the " discipline of States " or the rule of conscience.

However that may be, the most piquant feature of the judgment was that it was delivered by a tribunal with Russian members. An outstandingly brilliant paper by Prof. J. Graven, of Geneva (*Revue*, 1948, part 2), explains the conception of criminal law held in Russia today. Nobody who can possibly obtain that paper should fail to read it. With simplicity and clarity it demonstrates that that conception is the absolute antithesis of the one long cherished in Western Europe. Law in the west is based on the belief that the individual possesses certain inalienable rights to freedom of body and conscience provided he does not transgress the known and published laws of his society. Criminal law in the Soviets is, on the other hand, the weapon of the State, not the shield of the individual. It fluctuates, says Prof. Graven, with the exigencies of circumstances —one of its most disturbing features in Western eyes being the possibility of conviction and sentence for conduct never formally proscribed by any published law. But this paper cannot be usefully summarized, it must be read.

There are also articles of lighter weight which are very entertaining. An example is that of M. René Roger on 18th Century Punishments. (*Revue*, 1947, Part 2.) M. Roger regrets that " a falsely humanitarian tendency of recent years has led to an increase of every sort of delict and crime " and he recalls, with some few details, such ancient but apposite punishments as branding, breaking

on the wheel, drawing and quartering and suspension by the armpits. He concludes by formally recognizing the barbarity of some of these, but warns that unless a further growth of crime is desired severe punishment must follow grave offences. Would it were all as simple as this.

There are also essays on purely domestic laws. One of the most fruitful is by M. Gaudefroy Demonbynes, who comments on the laws which are the French equivalents of the Rent Restrictions Acts. Like the latter, the French Laws seem to be something of a hodge-podge enacted from time to time since the first Great War as necessity arose. Possibly a mistake was made in including the sale of furniture in premises to be let among the permitted acts, whilst prohibiting any form of premium. The result has been a losing battle by the Courts against the expedients adopted by greedy lessors to fix false and inflated values upon furniture which anxious tenants were only too ready to buy at any cost if that secured a home. This essay includes a paragraph which must be a delight to all who enjoy, amongst its other facets, the practicality of the French mind. The learned author says of these laws " it is certain that repression has given and can only give very limited results. Even today—in March, 1947—it is impossible without capital to find anywhere to live. In fact the liberty to set up house and work wherever you wish no longer exists in France. It is an unwise man who marries and has children." How many learned journals elsewhere published would be refreshed and enlivened by bursts of feeling and common sense like this.

These few observations give only a suggestion of the profit and entertainment to be found in the half dozen volumes of *Études* and *Revue* here reviewed. It is to be hoped that as many criminal lawyers as possible will obtain copies to study in detail; they are certain to widen their own outlook and possibly will admire sufficiently to indulge here in the sincerest form of flattery.

E. R. Guest.

ANNUAL SURVEY OF AMERICAN LAW

Annual Survey of American Law, 1942. New York University School of Law, Washington Square East, New York; 1945; lxiii & 944 pp.

Ditto, 1943: 1945; lvii & 962 pp.

Ditto, 1944: 1946; lxxxi & 1,252 pp. 5 dollars each volume.

For the regrettable delay in reviewing in this *Journal* these first-fruits of a new adventure in the United States your reviewer can only plead the pressures of the post-war period. It certainly was not due to lack of personal interest, for that was secured by the fact that this American Survey is the very lusty posthumous child of the *Annual Survey of English Law* and graciously recognizes this paternity. (Dr. Winfield's statement in the *Cambridge Law Journal* (Vol. IX, No. 3) that the American series started in 1928 confuses parent and child.) Nor did the delay arise from any failure to recognize the immense value of these volumes alike to American lawyers and to all who are interested in comparative law and, particularly, in the developments of the two great English legal systems.

The need for a systematic review of American legislation, decisions and legal literature requires no emphasis, but it is impressively illustrated by Dean Vanderbilt's reference to the 76,000 pages filled in 1942 by judgments, the 9,000 pages of legislation in that year, when the legislatures of most States did not meet, and the 11,000 pages of the 1942 *Federal Register* which bespeak the activity of the regulatory bodies of the national government. Exercising very considerable selectivity in their choice of material, the contributors to this most welcomed venture of the New York University School of Law have written reviews of the three years under notice which cover over 3,000 pages. The preparation of this amount of material in less than two years and its publication in such excellent format compels admiration—and almost the envy of those in England who had similar good intentions but were defeated by contemporary conditions.

Our English experience of producing an Annual Survey emphasized three major difficulties, the selection and classification of subjects, the adoption of broadly equal standards by all the contributors, and the avoidance of overlaps. The authors of the American Survey have, on the whole, most successfully overcome these difficulties.

The mass of material to be treated, apart from any other consideration, inevitably dictated the scheme of dividing the work into some three or four times the number of sections found in the defunct English counterpart. This spells some loss of sequence and some overlaps, but these defects are not serious. The work is divided into five main divisions: General Public Law: Public Law, Social Business and Labour Regulations: Private Law: Adjective Law: and Legal Philosophy, History and Reform. Parts of the classification may seem a little strange to English readers.

The subjects considered under General Public Law are International Law and Relations, Conflict of Laws, Constitutional Law, Civil Rights, Administrative Law, War Powers and their Administration, Federal Taxation and Local Government, with the addition in 1944 of sections on State-Local Taxation and (more significantly, perhaps) the Civil Service. The divorce of the sections on Constitutional Law and Civil Rights is of debatable value. The second Public Law division includes sections on Social Security and Welfare, Public Housing Planning and Conservation, Co-operatives, Public Utilities, Wartime Price Control, the Anti-Trust Laws, Security Issues and Exchanges, Unfair Trade Practices, Labour Law and Wages and Hours. "Private Law" covers Contracts, Agency, Sales, Banking and Negotiable Instruments, Security Transactions (a section which later becomes limited to " Suretyship "), Corporations (our " Company Law" mainly), Bankruptcy (in the earlier volumes associated with Corporate Re-organizations under the Bankruptcy Acts, a subject which becomes separate in the 1944 volume), Transportation (which would be better called " Shipping "), Aviation, Insurance, Equity, Real and Personal Property, Mortgages (after the separation from " Security Transactions " in the 1944 volume), Future Interests (in 1942 and 1944), Trusts, Succession, Copyright, Trade Marks, Patents, Torts, Crime and Delinquency, Criminal Law (with a separate section on Procedure in 1944), and Family Law and Persons. The last section was divided into two in 1943. (The part on " Persons " tends to cause an overlap, particularly with the sections on Constitutional Law and Civil Rights.) The fourth division on " Adjective Law " covers Civil Remedies and Procedure, Evidence and, a little curiously, Commercial Arbitration. The last division deals with Jurisprudence, Legal History (in 1943 and 1944), Administration of Justice, the Courts and Law Reform, and Legal Education, Bar Organization and Economics.

This bare enumeration of the sections of the work serves to illustrate the immense breadth of the Survey. It proceeds at many points beyond the limited confines of " lawyer's law." Not the least valuable and interesting parts of the work to a British reader are those which give a picture of the American scene outside the Courts and the Legislatures.

With material covering 3,000 pages before him, and with limited space at his disposal, a reviewer can only indulge in broad comments. His inclusions and his omissions speak only to his own fancies and are more of a commentary on him than on the contributors to the Survey. Every one of the sections has been expertly handled and will be valuable to those interested in their particular subjects.

The sections on International Law will probably contain little that is novel to experts in that subject, wherever they may reside, but the bibliographical references may be valuable to those outside the United States. Reading the Conflicts sections, a foreign reviewer is impressed by the abundance of materials which American commentators on this subject have on their own doorstep. One of the major subjects here each year is the working out of the implications of the

famous case of *Erie* v. *Tompkins* (1938) which abrogated the principle of *Swift* v. *Tyson* (1842) and decreed that federal courts must follow State common-law as found in State decisions. The American commentators seem to be getting used to the new doctrine, but it has lately called forth a blast of criticism from a distinguished French jurist who deplored the defeat of Story's effort to establish a federal common law. Another major subject is the effect of *Williams* v. *N. Carolina* (1942) with its doctrine of full faith and credit to be given to a divorce decree of the State where the petitioner is domiciled. Our constitutional lawyers will find Professor Alison Reppy's contributions on Constitutional Law and Civil Rights full of good things. Here is material enough on the doctrine of *stare decisis*, the relation of the federal to the State machinery, the most liberal attitude of the Supreme Court towards individual rights (an attitude which seems to be upsetting a considerable portion of professional opinion during the current anti-communist storm, judging from recent issues of some Bar periodicals), the spread of administrative powers, and the attitude thereto of the Supreme Court. Jehovah's Witnesses, Negroes, and Naturalized Aliens have given that tribunal sufficient opportunities to exhibit its liberalism and they have been fully taken. The problems on the transport of indigent persons over State boundaries are rather reminiscent of our long-forgotten parish poor-law! The close scrutiny by the Supreme Court of State sterilization laws present a more modern topic. Dean Vanderbilt's contributions on Administrative Law command immense respect for their breadth and vigour, and our controversialists on this topic should not miss them. All *our* problems find their counterparts on a larger scale in the United States, particularly the problem of judicial review of the activities of administrative agencies. The 1944 section is particularly stimulating by reason of its highly critical tenor. " Our Wartime Government," says the learned Dean, " has become the government nobody knows "! Each year he gave a most masterly summary picture of the American administrative set-up. The section on Local Government depicts a scene which is not very familiar to English lawyers. We are told that it has 155,000 units. But a familiar note is heard of resistance to the compulsory orders of wartime agencies " for fear of establishing new precedents in reduction of local autonomy." It is in this section that our Tort experts will find much comparative material on the topic of liability of local authorities. The sections on Social Security and Welfare will serve to correct English impressions of the American advance, or lack of advance, in these matters. In any parliamentary election in Britain candidates are bound to meet the division of views over the Co-operative movement, particularly in relation to taxation problems. In the American Survey each year these and allied problems are presented on the background of American Law, but the scene seems very familiar to us, apart from the 1942 note relating to exceptions to tort liability, which we have not yet met. With our programme of industrial naturalization, the section on Public Utilities may acquire a new significance. The sections on the Anti-Trust Laws are exceptionally interesting because they cover a period of intense, almost dramatic, activity on the protection of " the competitive system of free enterprise." National and international monopolies, doctors, railroads, insurance companies and many lesser breeds cannot escape the Anti-Trust Division. Labour arrangements are not yet out of this wood! In that aspect, at any rate, our recent Monopoly Act will cause no headaches! Reading the sections on Unfair Trade Practices, we may derive the impression that Britain may have a lot to learn from the activities of the Federal Trade Commission; be that as it may, in these sections we can find interesting material on our " passing-off," " slander of goods " and allied topics in the law of torts. The sections on Labour Law and Wages and Hours must interest British experts, particularly in their references to the workings of the Fair Labour Standards Act, 1938. We may not yet have fully analysed the legal implications of collective bargains, but the work is proceeding apace in the American Courts.

In the sections on Contracts we come to very familiar ground and they are

full of instructive comparative materials, with the topics of conditions, mistake, the Statute of Frauds, third-party beneficiaries, frustration and illegality much to the fore. (The American Courts seem to find no difficulty in applying the frustration doctrine to leases in appropriate cases.) These are sections not to be missed by British law-teachers. The latter, if they are concerned with the Law of Torts, should not miss the Agency sections, for it is here that they will find discussions of the *respondent superior* problems and they are surprisingly parallel to our counterporaneous discussions. (It is novel, at least, to find employers made liable for " the negligent pedestrianism " of their messenger-boys!) In discussions on the Law of Sales we detect a note of conservatism in the application of what we know as the " Snail Case " doctrine, but the problem seems to be increasingly met in the United States on lines which almost seem to be free of contract and tort doctrines! In the Banking and Negotiable Instruments section there is abundant material to interest our lawyers, particularly on forged drawer's signatures and indorsements.

In the section on Corporations, the topics of corporate finance, re-organization plans and their effects, interlocking directorates, and the sham one-man company were to the fore. The Shipping sections are, of course, concerned with American conditions, but it is interesting to note the divergence of practice between British and American underwriters following the *Coxwold Case* in the House of Lords in 1942. On Equity, it is notable that the citadel of separate jurisdictions (New Jersey) did not fall in 1942 despite the confident expectations that it would. The topics of rectification (or " reformation " as it is there called), injunctions, and the " clean hands " doctrine are the ones which will most interest English lawyers here. In the sections on Real and Personal Property, there is much to interest them, but one may be forgiven for saying that what may perhaps most surprise an English reader is that here is a living commentary on material which he only now finds in history books. This contributor admits that " old formalism slowly gives way, although reluctantly," and he is surprised by the " strong hold of the remote past."

Servitudes seem to be giving rise to animated discussions. The sections on Future Interests show *Shelley's Case* very much alive and the problem of the application of the rule against perpetuities casting doubts on the fertility of octogenarians! In Trust matters, the effects of the economic depression seem to have taken years to reach their full flood of litigation against trustees charged with breaches of trust in those difficult years. Apart from some interesting cases of " copyrightability," the most dominant note in the contributions on Copyright seems to be one of regret at the frustrated efforts to get local reform and attachment to international standards. The struggle to get the Trade Marks Law reformed was said to be coming to its climax in 1944 and it is of interest to note the conflict between the protection of trade marks and the anti-trust laws. (Adam Smith probably hailed, in whatever regions he may now be, the reference in 1943 by Judge Frank to " persons infected with the monopoly phobia " and his debatable statement that "the common law never suffered from such a neurosis.") On the Patent Law, the Supreme Court is said to be setting a standard of patentable novelty which is so high that few inventions can hope to pass the test! The 1943 volume discusses the Report of the National Patent Planning Commission.

If English Tort examiners suffer from lack of new ideas, these volumes provide the remedy, but they are warned that in the American Reports " the page yield per opinion is too great and the vitamin content, on the whole, is inadequate." In that respect they may feel some degree of fellow-feeling towards their American cousins! Here are crops of cases on hospital liability, dangerous premises, attractive nuisances, injured " automobile guests," problems of proximate cause, *res ipsa loquitur* (better described as " a deluge " than " a crop "!), defamation, malicious prosecution and every other conceivable tort topic! It is a strong temptation to dwell on many of these cases, but it must suffice to refer

to the judge who landed in jeopardy of libel damages by authorizing the publication of a judgment in an unofficial law journal, the defendants who anticipated their English cousins by letting clouds of steam on to the highway and blinded passing motorists, the very interesting Massachusetts formulation of the scope of the *Rylands* v. *Fletcher* doctrine, the decision that an allegation of poverty may be defamatory, the uncompensated leading athlete, a pillar of a temperance society, who found his likeness used to advertise beer, the compensated hospital patient whose photograph, despite her protests, illustrated a magazine article, and the innumerable bottles whose histories came before the Courts!

All who are interested in juvenile and adolescent crime will find plentiful comparative material in the articles on Crime and Delinquency. The sections on Criminal Law contain a great deal of material useful to English lawyers, particularly on Treason, proof of the *corpus delicti*, homicide, particularly in relation to negligence, and many other familiar topics. The death penalty difficulties in New York, reported in 1942, are of contemporary interest to us in Britain. The rule against self-incrimination comes in for heavy attacks. Some constructive murder decisions seem debatable on English grounds. Dean Vanderbilt was the Chairman of the Committee which produced the new Federal Rules of Criminal Procedure described in the 1943 volume. The new Louisiana Criminal Code was discussed in 1942. The task of the contributor of the section on Civil Remedies and Procedure was an immense one. Questions of jurisdiction and venue are multitudinous in the United States Pre-trial procedure (" hearing in chambers " may be our nearest title) gave rise to considerable discussions during these years. Attention was given in 1942 to the Restatement of the Law of Judgments. The Family Law sections are much concerned with local divorce laws, but one noted with interest references to the common law marriages which still exist in some jurisdictions and the cases on the " emancipation " of infants.

The Jurisprudence sections, and particularly the contributions of Professor Sloovere, richly deserve the notice of all who are interested in contemporary juristic writings, more especially those of Pound, Kelsen, Kessler, Cairns, Radin, and Frank. The Legal History sections are almost exclusively concerned with American history, but English readers of the 1943 volume will note the discussion of Professor Molloy's re-examination of the juristic origins of the rule in *Rylands* v. *Fletcher*. Finally, references must be made to Dean Vanderbilt's most interesting articles on the administration of justice in the United States with their wide surveys of reforms and projects of reform. Law teachers will be particularly interested in the 1944 report of the American Bar Association on Pre-Legal Education.

These brief references to some of the topics discussed in these volumes which have interested one English reviewer barely scratch the surface of the valuable deposits of legal material to be found in this American Survey. They do scant justice to the work of the contributors, but they may serve to excite the interests of others and to secure that these volumes are found in all our Law libraries. To the practitioner, the teacher and the research student they will assuredly prove a great boon and it is to be fervently hoped that the venture will reap the success which it deserves.

D. R. S. D.

NOTES.

Concurrent Bankruptcies and Creditor Equality in the Americas. — In an essay, reprinted from the December, 1947, number of the *University of Pennsylvania Law Review*, Dr. Kurt H. Nadelmann has reviewed the law of U.S.A., Canada and many South American States on the subject of equal treatment of foreign creditors in bankruptcy, and has drawn attention to the brake on international credit which a priority rule for local creditors imposes. The author has in previous writings[1] gone

[1] See, for example, Note in Vol. 28, *Journal of Comparative Legislation*, Parts III–IV, p. 131.

deeply into problems of bankruptcy in the conflict of laws, and has continually stressed the need for comparative study in this field. On the question of priority rights for local creditors two great bodies of law are at variance. Throughout the British Empire the general rule prevails that all debts, wherever arising and whatever the nationality or domicil of the creditor, are equally subject to the order of priority of payment established by the *lex fori* of bankruptcy proceedings. In some South American States,[2] on the other hand, the principle has been adopted of excluding creditors under any foreign bankruptcy until the claims of all local creditors have been fully satisfied. The question of creditor equality has thus become unnecessarily confused with that of unity of bankruptcy proceedings. So far as English law is concerned (and in bankruptcy matters one might well say British law), the two questions are kept quite distinct, if a rejection of both the principles of priority of local creditors and of unity of bankruptcy can be considered disjunctive.[3] Such a rejection is consistent with the best interests of international commerce. As Dr. Nadelmann points out, " A business man from abroad will not give open credit when he knows that, in case of bankruptcy of his debtor, he may not receive his equal share because of the possible operation of some local priority rule." Where priority is granted against assets " at the place of payment," as in the law of certain South American States, a foreign creditor may well try to secure himself by insisting, in Dr. Nadelmann's words, " on a contract clause which makes ' place of payment ' all places where assets of the debtor are located." But this solution may appear as a somewhat naïve type of evasion to certain South American Courts, whose preference for local creditors seems to rest more on conceptions of *ordre public* than on legal principle.

R. H. G.

The Status of the German Legal Profession.—Professor Karl S. Bader of Freiburg i.B. (French Zone), who as Generalstaatsanwalt has to combine the practical tasks of legal administration with academic studies, has written a short but stimulating essay (Die deutschen Juristen, 1947, J. C. B. Mohr, Paul Siebeck, Tuebingen) on the historical development of the German legal profession. He attributes what he calls the " inferiority complex," from which German lawyers in his opinion frequently suffer, to the subservient position which they have occupied since the Middle Ages. *Kleinstaaterei,* although it provided thousands of posts for legally trained officials, lowered the prestige of the legal profession by reason of the comparatively menial tasks in which lawyers were employed by their feudal masters. The reduction in the number of German states after the Napoleonic Wars did not improve the position but only led to the creation of a " legal proletariat," who often had to be satisfied with humble clerical work. The improvement that came with the Reichsjustizgesetz was too recent to allow any firm tradition of legal independence to be built up before the attacks made upon it by National Socialism. There was in any event no unified legal tradition, such as attached to the French *noblesse de la robe* or the English Bar, but only four comparatively isolated groups: judges, legally trained civil servants, practising lawyers and academic lawyers. On the judges as a whole Professor Bader is severe. In deliberately sought anonymity they sheltered behind an impersonal " Court," the honest and painstaking servants of authority. They were in fact not dissimilar in their outlook to the legally trained civil servants, whose obedience to the executive rather than to the law became particularly apparent in 1933. As to the practising lawyers, Professor Bader thinks that, although they never occupied a place in German society comparable to their position in France and England, they were less affected by National Socialism than other professional groups; but he also points out that German legal practice has not hitherto attracted the most able legal minds. The German academic lawyer, on the other hand, has frequently achieved great distinction, but, according to Professor Bader, he has tended to forget his legal allegiance in flirtations with other branches of knowledge such as sociology and philosophy. However, Professor Bader is not pessimistic. He draws attention to the great differences in the prestige of the legal profession within Germany itself; in Hamburg and in some of the South German states, for example, the lawyer has had a much more honoured position than in Prussia. He suggests a number of reforms of legal education and administration with the purpose of increasing the professional solidarity of lawyers as a class

[2] E.g., Argentina, Uruguay, Paraguay, Peru.
[3] See Judgment of Fry L.J. in *Re Artola Hermanos* (1890) 24 Q.B.D. 640.

and their sense of responsibility to the community. The whole essay, although only purporting to sketch the outlines of the problem, is refreshingly clear and realistic and opens up a promising field of comparative legal enquiry.

N. S. Marsh.

Tulane Law Review. — Recent numbers of the Tulane Law Review are rich in comparative material. That of October, 1947, is dedicated to the memory of the late Professor Buckland and, as might be expected, contains many articles by English and Scottish lawyers. Of interest to comparative lawyers are *Forms of Ownership,* by J. Walter Jones, *The Duty of Care in Negligence: A Comparative Study,* by F. H. Lawson, *Modernus Usus Juris Civilis,* by R. W. Lee, and *On the Teaching of Law Comparatively,* by F. F. Stone, the last of which is of peculiar value as coming from one who has been accustomed for many years to teach common law and civil law together in the same contract and tort courses at the Tulane Law School. The December, 1947, number contains a useful note by F. G. Hudson on the new Federal Tort Claims Act, which antedated the Crown Proceedings Act and, together with earlier legislation, brings the remedies against the National Government approximately into line with the present remedies against the Crown. This is a subject on which the traditions of the two countries are sufficiently differentiated from the civil law tradition but sufficiently divergent among themselves to make it worth the English lawyer's while to see what solutions the American Courts will have to offer to questions which have often hitherto been stifled at birth. *The New Community Property Jurisdictions,* by W. Q. de Funiak, shows some of the difficulties which are encountered when the community of goods between husband and wife, so familiar to continental and even South African lawyers, is introduced into the alien soil of a common law system. Eight Western and South-Western States, most of them formerly subject to Spanish law, have long had the community, though most of them have modified it profoundly. It has recently begun to extend its sphere of influence, not through any inherent superiority to the separate property system now prevalent in common law countries, but because the Federal Income Tax Law, which does not aggregate the property of the spouses, allows their community property to be divided into equal halves for tax purposes, thus bringing one or other of them, in many cases, into a lower income bracket than would otherwise be the case. The author reports, in a footnote added at the last minute, that the Pennsylvania Community Property Act, which had been enacted, one must presume for tax evasion purposes, has been declared unconstitutional in its entirety by the Supreme Court of the State. The reasons one cannot even conjecture, without knowing the intricacies of the Pennsylvania Constitution. But the author amply justifies his last remark that " It may easily be concluded that judges and lawyers in the new community property states are in for quite a time."

F. H. L.

Professor Lévy-Ullmann. — The news of the death of Henri Levy-Ullmann will have been received with the deepest regret by his many English friends who will hold his memory in honour not only as that of a great jurist, but also as of one who rendered invaluable services to the cause of a good understanding between France and England. He was in large measure responsible for the success which has been achieved in the establishment of cordial relations between the lawyers of the two countries on a foundation which still endures and promises to stand even more firmly in the future. As an interpreter of English law to the countries of the European continent he made a contribution to the development of the science of comparative law which represents his most notable achievement.

Lévy-Ullmann's personal charm and the old world dignity of his presence made a strong appeal to Englishmen. The occasion on which I first met him stands out clearly against the background of many memories as I write these words—an English summer day at Oxford in 1924—the austere and scholarly figure of the Professor crossing the quadrangle of All Soul's in the company of Edward Jenks—a few rapid words of introduction which gave an opportunity for the expression of my admiration of the address which Lévy-Ullmann had just delivered to the Society of Public Teachers of Law on " The Teaching of Comparative Law." This was the beginning of a friendship which I, for my part, valued very highly. Lévy-Ullmann was, perhaps, best known in England as the author of " The English Legal Tradition," a book described by Holdsworth as " something in the nature of a phenomenon in

legal literature." This was a tribute to an outstanding work which has proved his value not only to foreign students but also to English lawyers. Holdsworth wrote a foreword to the English translation of the book in which he gave it as his deliberate opinion that although written by a foreign lawyer it was " the best of all introductions to the English legal system."

Lévy-Ullmann was very successful as a teacher and the Institute of Comparative Law attached to the University of Paris, of which he was the founder and director, acted as a magnet to attract large numbers of foreign students every year to Paris. In the later years of his life he devoted much of his attention to Private International Law but it is as a Comparative lawyer that he will be best remembered. Like his master in the law—Saleilles—he belonged to the " universalist " school of thought which envisages a world-wide law designed to supersede all existing systems. This is a view which does not command much support at the present time but it is characteristic of Lévy-Ullmann's belief in the essential brotherhood of man and expresses the nobility and sincerity of the ideals by which he was inspired.

H. C. G.

Professor Edouard Lambert. — The death of Professor Lambert of Lyons on October 25, 1947, is a serious loss to the science of comparative law of which he was the greatest living exponent. It is impossible to sum up all his achievements in a few words but his chief claim to the recognition of posterity will be the fact that it was he—more than any other man of his time—who rescued comparative law from the danger of becoming a mere breeding ground for a complex of abstract theories and ensured its development into an instrument for the promotion of friendship between the nations and the adaptation of rules of law to the requirement of an age of rapid change.

Throughout his long career Lambert was closely associated with the University of Lyons; first, as Professor of Legal History, from 1896, and, from 1921 onwards, as Professor of Comparative Law. In 1906 he became Director of the Khedivial School of Law at Cairo but only held this post for a brief period. The sympathy which he displayed for the nationalist aspirations of his students rendered him *persona non grata* to the British Government and he was dismissed. It was characteristic of the man that he accepted this set back in his career with good grace and that he never bore any malice towards the English people for whom he always had a genuine liking and respect. Nothing gave him greater pleasure than his election as an Honorary Member of the Society of Public Teachers of Law. The contacts which he established with Egyptian lawyers during the period of his residence in Cairo gave him a keen interest in the laws of the Muslim countries and led to his becoming the moving spirit in the establishment of a School at Law at Beirut which was affiliated to the University of Lyons. In 1921 he founded the Institut de Droit Comparé at Lyons which, under his leadership, became one of the most active centres of legal research in Europe. Lambert was quick to realize that the most profitable field for comparative research by his students lay in the domain of Anglo-American law and it was for the most part in this direction that he guided the efforts of his pupils.

His activities were, however, not confined to the sphere of his Professorial Chairs. He was one of the best known and most popular personalities to be found at the gatherings of comparative lawyers held in the years between the two world wars. He also played a very prominent part in connection with the foundation and the subsequent assemblies of the Academy of Comparative Law. He did not however participate in the numerous conferences which had as their objective the unification of some branch of private law. He was by temperament too ardent and impatient of restraint and of dictation from above to allow him to function as a delegate at these gatherings and he wisely kept aloof.

He has left a good deal of written work, much of it scattered in introductions to books by his students and in the pages of the Acta of the Academy of Comparative Law. But he was the author of one of the classics of Comparative Law—*La Fonction du Droit Comparé*—a work which he never completed owing to the change which took place in his views as to the nature and objects of Comparative Law. He took a keen interest in the work of the International Labour Office and was the originator of the series of " Decisions on Labour Law " which was published under the auspices of the Office. But Lambert's chief interest was in the preservation of peace throughout the world and he was an enthusiastic supporter of the League of Nations. On

one occasion, at Geneva, when asked to define the aims of comparative law, he rose to his feet and exclaimed " Quel est nôtre but? Nous travaillons pour la paix!" These words sum up the aims and the lifework of one whose enthusiasm and zeal provided the greater part of the driving force which in recent years has drawn the lawyers of different countries into closer fellowship and is slowly but surely breaking down the barriers which stand in the way of a free interchange of ideas and a community of thought between them.

H. C. G.

New York Legislation Annual.—Under alphabetical subject-headings, from Agriculture to Workmen's Compensation, the *New York Legislative Annual* summarizes the prior stages of the State's statutes of 1946. It is as though someone edited for Britain a collection of the memoranda prefixed to our Public Bills or perhaps of the briefs which departments are reputed to prepare for Ministers' second-reading speeches.

In the United States this " legislative history " is allowed to resolve doubts of the meaning of a statute. Professor Walter Gellhorn's judicious foreword observes that for Federal laws a practitioner derives interpretative assistance from the debates reported in the Congressional Record and from the printed hearings of committees of the House and Senate. In New York and other States there are often no committee reports; the record of debates is scanty, and the Journals of the Legislature contain mere details of formal proceedings. We can thus appreciate the value of this Legislative Annual, even if our own courts would ignore " legislative history " when inquiring into the meaning of an enactment.

C. T. C.

Town and Country Planning Act, 1947.—The short title of the Town and Country Planning Act, 1947, in many ways is a misnomer, or at least an understatement of the far-reaching effect of the measure. The Act goes a long way beyond the scope of previous planning legislation. Its object is to ensure that the use of land is made to accord with the national interest, and to achieve this result it has found it necessary to deal with a number of topics which from an examination of previous planning legislation would appear to be entirely foreign to the subject. That it should introduce a form of planning control requiring permission to be obtained for any new operations on land or for any change in the existing use of land is what might be expected. But it is at first sight startling to find that the Act should contain provisions giving landowners claims against a fund of £300 million for the depreciation in the value of their property produced by the new planning control, requiring payment to a Central Land Board of development charges when any change is made in the use of land, conferring exceptionally wide powers of compulsory purchase, and fixing the basis of compensation for all compulsory acquisition at the existing use value of the property. All these apparently extraneous matters are in fact justified as necessary to make planning control effective, since they are intended to remove the deterrent effect exercised on the bold use of planning powers by the provisions for compensation and betterment in earlier planning legislation. But their broad result goes far beyond the previously understood field of planning as a mere local, or even national, government service. They profoundly alter the relation of the landowner to his property and severely curtail the conception of ownership. Henceforth the owner is reduced to something not unlike a life tenant impeachable for waste, while the development rights of all land have in effect been nationalized. In this aspect the Town and Country Planning Act, 1947, is a further illustration of the way in which legislation concerned primarily with public law may widely modify private law conceptions.

For this reason planning law will intimately concern not only the local government administrator, but also the professional advisers of all who have dealings in land. In order to make familiar the contents of the Act and of the vast mass of delegated legislation to which it will give rise Messrs. Sweet and Maxwell have begun publication of a "Journal of Planning Law."[4] The first number opens with a foreword by Lord Justice Scott, while the scope of the Journal is indicated by the

[4] *The Journal of Planning Law.* Published monthly by Sweet and Maxwell, Ltd., 2 and 3 Chancery Lane, London, W.C.2; annual subscription, £1 10s. (Subscription for 1948 (April to December), £1 2s. 6d.)

Editorial Board, which consists of Dr. Harold Potter, Mr. Desmond Heap and Mr. E. C. Strathon, thus combining conveyancing, local government and the surveyors profession. In addition to a number of articles on various aspects of planning law, the April number has various interesting features. It gives a list of the statutes and subordinate legislation in force which relate to planning in a broad sense; it contains the addresses of various authorities and associations concerned with planning; and it includes what, if given full scope, might grow into a formidable feature, in the form of a " Puzzle Corner " where the reader is invited to try his hand at solving such puzzles as the difficulties " Mr. P-ckl-s " is likely to encounter in persuading the " Br-df-rd Corporation " to buy his land.

It may perhaps be doubted whether even the Town and Country Planning Act of 1947 and the other extant planning legislation can indefinitely support a special journal, but it is certain that for a number of years that Act will raise many novel problems which such a publication as the " Journal of Planning Law " can usefully bring to the attention of the professions affected by them.

W. O. H.

Canadian Bar Association.—The 1948 Year Book of the Canadian Bar Association contains, as usual, a valuable account of the work of the Canadian Uniform Laws Commissioners. Among other points of interest may be noted a resolution calling for the appointment of a commission to undertake a complete recodification of the criminal law, the draft of a Uniform Mechanics' Lien Act, a redraft of the Uniform Conditional Sales Act of 1922 and a report of the Ontario Commissioners on the Uniform Frustrated Contracts Act. It looks as though the latter Act will be made to follow pretty closely the English Act of 1943, but the exceptions, including that relating to advance freight, are not favoured. The Table of Model Statutes shows that the process of adoption by the various Provinces, though it has slackened, has by no means stopped; and new model Acts continue to be offered for adoption.

F. H. L.

Two Central-American Legal Periodicals.*—Readers who are interested in legal theory and comparative law and who possess sufficient knowledge of the Spanish language will agree that there can hardly be a more attractive legal periodical than the Review issued by the Mexican National Law School. The first issue for 1947, a splendidly produced volume of not less than 344 pages, contains in addition to informative articles on individual topics of Mexican law and legal history and on the reform of penal law in Peru, translations of three articles of outstanding value by non-Mexican authors (Huntington Cairns, Mario Lins and Kurt Nadelmann). This is perhaps an idea worth copying elsewhere. Articles on questions of legal theory are nowadays published in all the four corners of the world and in many languages with which only few jurists can be familiar. Is it not one of the tasks of an academic legal periodical to facilitate acquaintance with works not easily accessible in their original language or place of publication? One may well hope that increasing paper allotment may render it possible for our own legal periodicals to perform this task. Very thorough reviews of numerous South American and other works in all fields of law, but especially on legal theory and jurisprudence, are, as always, a feature of special iterest in this volume. The study on the conception of justice by the famous Swiss theologian Emil Brunner, " Gerechtigkeit," is reviewed by Professor Recasens Siches on no less than eight closely-printed pages. The reviewer rightly stresses that Brunner has made a contribution of great value not only to theology, but also to philosophy and jurisprudence, and that both, his arguments as well as his results, are of the greatest value even to those who do not share the protestant conviction which forms the background of his work.

The latest edition of the Revista Juridica de la Universidad de Puerto Rico is nearly entirely taken up by an essay on the writ of *habeas corpus* in Puerto Rico from the pen of Professor Santos P. Amadeo in the legal history of Puerto Rico. The legal institution of *habeas corpus*—which is, of course, unknown to the European continental laws—is recognized in no less than 15 Central and South American

*Universidad Nacional Autonoma de Mexico. Revista de la Escuela Nacional de Jurisprudencia. Tomo X. January–March, 1948. No. 37. Mexico. 335 pages.

Revista Juridica de la Universidad de Puerto Rico. Vol. XVII. September to October, 1947. No. 1. 138 pages.

Republics, a most remarkable instance of modern " reception." In Puerto Rico the writ of *habeas corpus* has been introduced in its present form by the constitution (Acto Organico), which was approved by the U.S.A. Congress. The Puerto Rican legislature adopted the Californian State law on *habeas corpus* with the result that the decisions of the Californian state courts possess persuasive authority in Puerto Rico. Among the reviews, which fill the rest of the issue, are two of works from this country.

E. J. Cohn.

Jubilee of The Canadian Bar Review, Vol, XXVI. No. 1. January, 1948.—With this issue, the Canadian Bar Review celebrates its 25th anniversary of its founding. To mark the occasion, the issue, considerably enlarged, is given over to a survey of developments in Canadian law over the last quarter century. The articles range over an extremely wide field. They deal with developments in constitutional law, torts, delicts, and quasi-delicts, contract, criminal law, company law, insurance law, the law of industrial and intellectual property, evidence, administrative law, labour law, taxation law, conflicts of law and comparative law. There are two contributions in French: le droit commercial québecois and capacité de la femme mariée. As befits the occasion and the subject matter of the various papers, all the articles have been written, to use the learned editor's felicitous phrase, by " members of the immediate family," that is by Canadian lawyers.

It is obviously impossible to deal with all the articles, and we must confine ourselves to two or three only. Mr. Vincent MacDonald in " The Constitution in a Changing World " castigates the Privy Council's decisions upon the distribution of powers between Dominion and Provinces as a " fundamental distortion of the scheme of division." He considers that direct constitutional amendment is required to give the Dominion the necessary powers to deal with contemporary problems. At least, he hopes for agreement to an amendment which will enable the Provinces to delegate to the Dominion legislative powers in relation to specified matters for defined periods.

Mr. J. D. Falconbridge has written a survey of developments in the field of Conflict of Laws. In very brief compass the learned author deals with many subjects: marriage, nullity, domicile of married women, the assumption of jurisdiction in personam in questions affecting foreign immovables, renvoi and classification. Many English students of the Conflict of Laws would endorse Mr. Falconbridge's comment on Dicey on Conflicts: " a book which even in its fifth edition (1932) is essentially a nineteenth century book, stating the conflict of laws in a set of stereotyped rules and exceptions, reproducing all the odds and ends of the most casual *obiter dicta* of English judges."

The most provocative paper in the issue is, without much doubt, Mr. C. A. Wright's article on the Law of Torts. Mr. Wright insists that the only sound approach to the law of torts is as a dynamic process which must attempt to reconcile conflicting claims. He points out that English texts have, in the main, either ignored this approach, or if they have taken it at all, have dropped it almost immediately. As a result, the law has been caught up in pigeon-holes which fail to expose the real issue. In words like " ultroneous," " extrinsic," " proximate cause," the real problems are obscured. And the real problem in the law of torts is: can the defendant's conduct be said to involve an unreasonable risk of the harm in question? Mr. Wright is quick to point out that framing the question in this way will not supply the answers ready made, but it will at least serve to strip away the dead wood which prevents us from getting to the heart of the problems in tort law. Mr. Wright exposes many departments of tort law to devastating and convincing analysis along these lines. There is one small point. The author says of *Donoghue* v. *Stevenson,* that it has not, as yet, been extended to real property, citing *Otto* v. *Bolton, Davis* v. *Foots* and *Travers* v. *Gloucester Corporation.* But what of *Haseldine* v. *Daw* (1941), 2 K.B. 343, and *Brown* v. *Cotterill,* 51 T.L.R. 21? This point is discussed by Paton, 16 Australian L.J. 122.

This jubilee number celebrates the occasion in fitting style. We can only conclude by wishing long life to a journal which, in a short space of time, has come to occupy a very high place among contemporary legal publications.

Zelman Cowen.

Programme for International Congress of Comparative Law, The Hague, 1-7 August, 1950 —The Permanent General Secretary of the International Academy of Comparative Law has been asked to circulate the list of questions drafted for the Congress programme. This list should accompany a circular recommending the constitution of a National Committee for each country.

1. *National Reports.*

It will be the task of the National Committee to decide the questions for their national reports and to designate their reporters at their discretion.

The national reports should be prepared in the language of their authors. The National Committee should, however, produce a translation in one of the principal languages. On the whole, the reports should not exceed 5,000 words. They should reach the National Committee by June 1, 1949. President of this Committee, Professor Elemér Balogh, 385 Woodstock Road, Oxford.

2. *General Reports.*

The Academy will consider these reports at its annual session in August, 1949, and designate general reporters. These reporters will prepare their reports in their national languags, but will, so far as possible, submit a translation to the National Committee in one of the principal languages. The general reports must reach Professor E. Balogh not later than June 1, 1950.

The Academy reserves the right to appoint one or more reporters for the questions under consideration.

SECTION I

A History of Law

1 Forms of marriage among the Greeks and the Romans.
2 Characteristics, features and effects of " detentio " in ancient law.
3 The history of legal terminology: historical and comparative study of the language of law, determination of applicable methods.
4 Legal protection of minors in the Middle Ages.
5 Dual nationality in the republics of antiquity.
6 Form and evidence in the republics of antiquity.
7 The influence of professors on the formation of law during the ages.

B Ecclesiastical Law

1 The canonical status of the " Action Catholique."
2 Episcopal national reunions and their juridical status.
3 Legal structure of pious foundations.
4 The legal personality of religious orders and of congregations and their creation and regulation at Canon Law, their recognition or their non-recognition in the different countries.
5 The marriage of Catholics brought up without religious influence.
6 Legitimation of the natural child and the rights of the unmarried mother at Canon Law.
7 Equity in Canon Law.

C Legal Ethnology

1 Essential nature and proper methods of legal Ethnology.
2 Relations between law and custom in primitive law.
3 Comparison of primitive institutions with the institutions of civilized nations.
4 Private vengeance and the intervention of public authority (the State).
5 Marriage ceremonies among primitive peoples.

D Oriental Law

1 The principles of International Law in force in the countries of the Orient.
2 Fundamental principles of the law of succession (Hindu law) (Mohammedan law).
3 The theory of " abus des droits " in the musulman jurisconsults.
4 The spirit of family law in Oriental countries.
5 The principal characteristics of the law of primigeniture in India.
6 The legal position of colonies of occidental merchants in the Near East and in North Africa during the Middle Ages.
7 The reception of Western law in Oriental legal systems.

E Philosophy of Law

1 The legal notion of the human person and the rights of man.
2 The protection provided for the rights of man.
3 Essential economic rights.
4 Different conceptions of the relations between law and equity.
5 The present status of legal philosophy and the science of law in different countries.

F Study and Teaching of Law

1 Comparison of educational methods and institutions. Their merits and their defects.
2 Unification of the methods of legal instruction. Opportunity to create an international faculty of law.
3 Opportunity to create an International Centre with the function of organizing legal documentation.
4 Comparative Law from the viewpoint of the unification of law.
5 Present state of the unification of law in different countries.
6 Limits and methods of international unification of private law.

SECTION II

I Civil Law

1 Legal limitations on the sub-division (*morcellement*) of real property.
2 Extension of the rights of tenants in the recent evolution of land law.
3 Obligations payable in devaluated currency.
4 Warranties against dispossession and defects in goods sold.
5 The theory of " imprévision " and frustration in contracts.
6 Proof of death in case of absence.
7 Prescription, statutes of limitation, " Déchéance."
8 Penal clauses in private law contracts and their enforcement by the courts.
9 Powers and duties of executors and administrators.
10 Assignment of contracts.

II Private International Law

1 Autonomy of the will in private international law.
2 Public policy in private international law.
3 Conflict of laws with regard to foreign decedents' estates.
4 Effects of measures of confiscation and expropriation by a foreign authority.
5 Effect of marriage on nationality.

III Civil Procedure

1 Summary judgments and " jugements exécutoires."
2 Oral and written elements in civil procedure.
3 Contempt of court in Anglo-American civil proceedings and its equivalents in other systems.
4 Specific performance in Anglo-American law and its equivalents in other systems.

SECTION III

A Commercial Law

1 Insurance against legal liabilities arising from motor vehicle accidents.
2 Right to payment on a life insurance policy taken by the insured for the benefit of a third party.
3 The existence and desirability of corporate shares without par value.
4 Insurance of " through " shipments carried successively by land, sea and/or air.
5 Desirability of the creation or maintenance of commercial courts and the relation of this institution to the development of law.
6 The legal conception of " fonds de commerce " and its consequences.
7 The institutional nature of associations with limited liability (Sociétés de capitaux).
8 Postal money-orders.
9 Effects of changes in the value of money in international payments.

B Rights of Authorship

1 The different systems followed with regard to the issue and publicity of patents.
2 Enjoyment and exercise of rights of authorship and invention appertaining to employees or civil servants.
3 Exercise of rights of authorship and invention by juristic persons.
4 The facilities for work and legal guarantees provided for scientific investigators in different legal systems.
5 The different national solutions with regard to alienability of the " moral rights " of the author to his scientific work.
6 The treatment in legislation, doctrine and practice of the problem of compulsory use (against compensation) of the rights of authors by public authorities.

C Industrial Legislation

1 Legal regulation of industrial "ententes" (cartels, etc.).
2 Recognition, sanctions and limitations of the right to strike in different legal systems.
3 Recognition, sanctions and limitations of the right to work in different legal systems.

SECTION IV

A Public Law

1 Fundamental rights of persons and social groups, their guarantees in modern constitutions.
2 Nationalization and private property.
3 Review of the constitutionality of laws.
4 Relations between Governments and Parliaments.
5 Relations of heads of States with Governments.
6 "Pleins Pouvoirs."
7 Bicameral systems.

B Penal Law

1 Penal law and professional discipline.
2 Rights of the defence before the examining magistrate (juge d'instruction).
3 Penal jurisdiction over air navigation.
4 Penal law and the automobile.
5 Jurisdiction of a state in respect of offences committed against its nationals abroad.
6 Non-retroactivity of penal law.
7 Interrogation of the accused.
8 The system of "mise à l'épreuve."
9 Repression of press or wireless defamation and the right of reply.
10 Legal protection of professional secrets.

C International Law

1 Obligations of States arising from the dismemberment of another State.
2 Maritime blockade.
3 Neutrality of the air.
4 Jurisdictional immunity of foreign states.
5 Legal status of international officials.
6 International tribunals and private interests.
7 International law concerning propaganda.
8 The creation of a permanent international jurisdiction.
9 The rule of non-discrimination and the protection of minorities.

NOTICES OF BOOKS.

CHINA

The appearance of this volume[1] among the severely legal treatises and textbooks which usually bear the familiar Stevens imprint is as pleasant as it is unexpected. Not that the distinguished author has no claims to be accounted a member of the legal fraternity—is he not a barrister and honorary bencher of the Middle Temple?—but here he doffs his wig and gown and comes before us not as a lawyer but as the exponent of the Way of Life of his native country of China. No more fitting rôle could be assumed by the Chinese Ambassador at the Court of St. James's than to be the interpreter to western minds of the system of philosophy which through the ages has been the inspiration of his great nation. China, he reminds us, comprises a quarter of the human race and is larger in area than the continent of Europe.

The author has chosen an opportune moment for the task which he has set himself. The geographical divisions of the world are fast disappearing as modern methods of transport develop. China is now nearer in time to London than was Rome in former days and with the growth of physical communications the need for intellectual and spiritual understanding between East and West has become correspondingly more urgent.

In these pages will be found distilled the essence of the four thousand years' old culture and wisdom of China. The central figure is Confucius (551–478 B.C.), and next to him ranks his disciple Mencius. With the teaching of these two sages, says Dr. Cheng, "the whole Chinese social system, or rather what may be called Chinese civilization and culture . . . is saturated." Their doctrines as enunciated

[1] *China Moulded by Confucius.* By His Excellency Cheng Tien-Hsi, LL.D. (London: Stevens & Sons, Limited. 1947.) Pp. 264. Price 18s.

in their sayings and writings and as exemplified in their lives are set before us in ample detail and with illuminating comment. Drawing upon his wide reading of English literature Dr. Cheng delights in quoting from Shakespeare, Dr. Johnson, Gibbon and many others passages which chime with the thoughts of Confucius and his disciples. These frequent and happy analogies are presumably invoked to demonstrate the fundamental identity of human nature the world over. It is indeed remarkable to find that the maxim that a judge should " rather err in letting off a person who is guilty than err in condemning to death a person who is innocent " has in China an antiquity of over 4,000 years. The argument that " punishments that are excessive cease to be deterrent," attributed to Han Fei, the head of the Juridical School of Chinese philosophy who lived in the third century B.C., has been echoed by all English advocates of criminal law reform throughout the past century and has been heard again in recent debates in Parliament on the abolition of the death penalty. In these days we have only too good reason to realize the truth of the aphorism of Lao Tze, a contemporary of Confucius—the more laws there are, the more crimes there will be—which Dr. Cheng aptly compares with Milton's line—" So many laws argue so many sins."

But while such instances and the many quotations from Confucius constantly remind us of truths common to humanity, no one can read this book without being impressed with the different mental atmosphere which pervades it. The Chinese sage proclaims a gospel of tranquillity and ascetic simplicity, or an ordered ritual of family life, of altruistic sentiment, and of reverence for the things of the mind. His is an ethical rather than a religious conception of man's place in the world. His attitude is reflective rather than active. Yet this like all generalizations is not the whole truth. The Chinese in literature, in art, and in inventiveness have shown that they can be great in achievement as well as in meditation. The great Chinese Encyclopædia compiled in the eighteenth century from 173,187 books consists of 79,582 treatises bound in 36,378 volumes, surely the most massive literary production in the history of literature; the art of China as seen in the great exhibition in London in 1935, which Dr. Cheng so successfully organized, demonstrated the pre-eminence of his country in æsthetic accomplishment; and it is to China that the first invention of paper and printing and of the compass must be credited.

Still, the difference remains. Western civilization has its own distinctive mood and tempo, its stirring practicality, its preoccupation with scientific and material progress and its own characteristic literature and art. The difference is not to be regretted. It is because of the diversity of the contributions which the East and the West can make to the spiritual heritage of mankind that their comprehension of each other is so essential. To that most desirable end this remarkable work cannot fail to lend notable aid.

M.

INTERNATIONAL LAW

MUCH has happened since the fifth edition of this volume was edited by Professor Lauterpacht in 1937. The labour, skill and discrimination involved in the preparation of this, the sixth, edition[2] have been immense. Indeed, no one who has not edited a standard textbook of this size and character can have any conception of the task which he has undertaken until he has accomplished it.

In the first place it has been necessary to maintain one of the salient characteristics of " Oppenheim " by inserting references to British and foreign literature, both periodical and more permanent. This involves wide reading and a continuous process of selection. The *Annual Digest and Reports of Public International Law Cases,* for which the same editor is responsible, has added a new burden for editors, and a large number of new decisions have been faithfully noted from this indispensable source of raw material.

But the maintenance of the volume as a piece of the apparatus of any worker in International Law is only one aspect of the editor's task. A comparison of this with the fifth edition soon reveals the large amount of new matter that clamoured for admission, not in vain, and the large number of new sections and sections re-written. We may mention in particular several sections on different aspects of Recognition; sections on the Dominions as Sovereign States, Equality of States and Immunity from Jurisdiction, Recognition of Foreign Official Acts, Limitations of Jurisdictional Immunity, Humanitarian Intervention, Modifications of the Monroe Doctrine,

[2] Oppenheim, *International Law,* vol. i, Peace. Sixth Edition. By Professor H. Lauterpacht. (London: Longmans, Green & Co.) Pp. liii, 940, 704.

Relaxation of Territorial Supremacy in favour of Allied Governments, Civil Air Navigation, Conclusiveness of Statements of Foreign Offices before Municipal Courts, Diplomatic Privileges of Non-diplomatic Persons; and a group of sections which bear witness to the increasing attention being given to the individual and to human rights in the system of International Law. This is a movement to which the editor has made elsewhere notable contributions, both in literary and in practical work.

His treatment of the League of Nations and the United Nations requires notice. In Chapter IV, entitled " The Legal Organisation of the International Community," he has introduced five new sections on " The Principles of International Organisation." The great majority of the sections devoted to the League of Nations in the previous edition have been retained—wisely, I think, because some knowledge of the contents and the working of the Covenant help in the understanding of the United Nations, upon the nature, organs and constitution of which the editor has written thirty new pages. Similarly, while retaining the earlier sections on Mandates, he has added nine pages on Territories under the System of Trusteeship. In addition, throughout the volume, the establishment of the United Nations has required frequent additions and much revision.

" Oppenheim " grows in each edition, which may be regretted from the point of view of one who wishes to read a book with a view to a general acquaintance with the principles of International Law. But this growth is inevitable if " Oppenheim " is to maintain its position as a starting-point for the enquiries of diplomats, practitioners and academic authors. All these users of the book are once more greatly in Professor Lauterpacht's debt. It is obvious that there is no one in the United Kingdom who could have done the job so well. A. D. McN.

PEACE, SECURITY AND THE UNITED NATIONS

These five Harris Foundation Lectures[3] were delivered at the University of Chicago in July, 1945, after Germany had collapsed but before the atom bombs had been dropped on Japan. It is most interesting, after a lapse of three years, to see to what extent the prophecies of the speeches have been fulfilled and to judge whether the premises on which they were based have been affected by the kaleidoscopic events that have occurred during this brief period. In his preface Professor Morgenthau anticipated such an approach because he pointed out that " the future of the Charter will primarily depend not upon the Charter itself but upon political developments which will take place quite independently of the Charter." It is still too soon to form any final judgment concerning the efficacy of the Charter, but the past three years have furnished us with considerable material on which a preliminary survey can be based.

In his essay on " Power and Justice " Professor Corbett discusses the clause in the Preamble to the Charter which asserts that the peoples of the United Nations are determined to " establish conditions under which *justice* . . . can be maintained." He points out that the definitions of justice that can be accepted by a large number of nations will, on examination, prove too abstract to mean much in actual value. Individuals tend to identify justice with their own needs or desires, and this tendency is increased in the case of nations or states because they have a less developed sense of community. " It is a patriotic habit," he says, " to make a virtue of selfishness in the state." It is too much to hope that a unified working concept of justice can be found in a society of states characterized by such differences in social and political values. Professor Corbett therefore reaches the utilitarian conclusion that " the difference between justice and injustice for me is mainly a difference between short-term and long-term, or unintelligent and intelligent, calculation of our own interest." In other words " honesty is the best policy," both in international and in individual affairs. Whether the nations will be wise enough to realize this is a question which he does not attempt to answer. Does the experience of the past three years enable us to say that the short-term or long-term calculations have predominated? It would require considerable courage to give a categorical reply.

In his essay on " The Treatment Of Enemy Powers " Professor Burns points out that the policy of the three Great Powers regarding Germany consisted of three elements, namely, economic and industrial disarmament, reparation, and denazification. On the question of disarmament he says that this might be achieved either by a form of controls or " by detaching from Germany those territories in the east

[3] *Peace, Security and the United Nations.* Edited by Hans J. Morgenthau. (University of Chicago Press: Chicago, 1946.) Pp. 134.

and the west that contain most of the heavy industries, such as Upper Silesia, the Rhine Valley, and the Ruhr Valley." Each method has its difficulties, but a choice ought to be made as soon as possible because " it is even more necessary to communicate the outlines of longer-run plans to the enemy peoples in order to eliminate major uncertainties that might encourage them to postpone their adjustment to the ways of peace." Unfortunately we do not seem to be nearer to a solution of this problem to-day than we were three years ago.

It is interesting to note that Professor Burns emphasizes the difficulties of obtaining reparations from Germany and the dangers of using slave labour. His pessimism has been justified, because to-day it seems probable that for some years to come the major problem will be, not reparations, but how to enable Germany " to produce enough to keep itself going on a bearable standard of living." Sustained depression in Germany " will impede their ultimate integration into the world economy."

Professor Graham discusses the relations between " Great Powers and Small States." In his valuable historical introduction he points out that this has always been a problem, but that it has not been sufficiently considered in the past. In the nineteenth century by " an inarticulate major premise of a politico-military character," the lesser states were permitted to evade every form of accountability for the maintenance of the societal peace by transferring exclusive political responsibility for action to the Great Powers. One of the odd things was that the United States, owing to a peculiar political time-lag, continued to play the role of a small neutral long after it had become a world figure. The tragedy was that the small Powers, " giddy with the intoxicating wine of formalistic equality," claimed rights while evading their duties. The League of Nations Covenant tried to establish collective responsibility, but this was dealt a fatal blow by the Four Power Pact of Rome of 1933, which was the first step that led to Munich and eventually to war. The United Nations Charter has given us another opportunity by creating " a new framework of legality, a working mechanism for the exercise of power; . . . a system of societal responsibility from which there is no ethical escape, no refuge in an obsolete neutrality, no retreat in a renewed artificial balancing of power." Professor Graham therefore concluded (in 1945) that " to-day, as we look into the future, we have vastly greater reason to rejoice." In 1948 we are rejoicing in a very restrained manner, but there are still some grounds for looking into the future with tempered optimism.

Essays on international affairs rarely contain the sparkle and wit which are found in Professor Schuman's " Regionalism and Spheres of Influence." He begins by saying that there is a " contradiction between the realities of power in the world society and the vocabulary we habitually employ in speaking of international relations." We must realize that the problem of peace remains a problem of power politics since nothing deserving to be called world government is on the horizon. For an indefinite future, Washington, Moscow and London either will rule the world together or will ruin the world in a new rivalry among themselves for global hegemony. The ideal of the world association of fifty-odd sovereignties, all equal in rights and duties, is dead. All this, as Mark Twain said of Richard Wagner, is not nearly so bad as it sounds, because regional security arrangements, loosely integrated by the Charter itself, will be developed round each of the three Great Powers. If their interests are recognized, then there is no reason why they should conflict. This prophecy is of particular interest to-day because during the past three years these regional arrangements have undoubtedly sprung into being, and although some persons regard them as the precursors of war others see in them the guarantee of peace. Professor Schuman's optimism is therefore encouraging.

In the final essay Mr. Staley discusses " World Organization on the Economic Front." The League of Nations was thought of mostly in political terms, but to-day we realize that a world seething with economic and social discontent can hardly be kept in order for long merely by " sitting on the lid." The world security system of to-day cannot stand much strain, and it will therefore fail unless the economic problems can be solved by collective effort. In 1948 this truth is even more patent than it was in 1945, but we cannot as yet be certain whether it has been recognized by the peoples of the world. Here there is a special danger that if a conflict between the long-term and the short-term policies should arise, the latter would triumph because short-sighted selfishness is still mistaken for patriotism.

A. L. Goodhart.

SWISS PRIVATE INTERNATIONAL LAW

When the first edition of this book[4] appeared in 1937 it was clear from the beginning that it would occupy for a long time to come the place of the standard work on Swiss Private International Law. It is therefore not surprising that a second edition became necessary after an interval of only seven years. Moreover, the usefulness of this work is not restricted to the confines of the Swiss Confederation. The geographical situation of Switzerland and its close connections with its neighbours have always stimulated a mutual interchange of ideas in the field of legal development, in which Switzerland gave as much as it received from France, Germany, Austria and Italy. Thus it could happen that a German text-book on Private International Law could be published in 1932 which professed to pay special regard to Swiss law, and that a Handbook of Swiss Private International Law could be written which makes full use of German, French and Italian practice and integrates them into its own system, as Swiss courts are wont to do themselves, without losing its national character. On the other hand, its somewhat cosmopolitan character should, in turn, fertilize the science of Private International Law in the neighbouring countries. But English lawyers also should find much of interest in this system, which, more than most other continental systems of private international law, uses methods akin to those which are employed in England. Residence, rather than nationality, the proper law of the contract, the right accorded to a testator to select the law governing his will and a choice of tests for determining the formal validity of wills strike a familiar note.

In the introduction Dr. Schnitzer analyses the basic principles of private international law. This section can serve as an excellent example of the modern approach. The defects of the teachings of the Statutists and of Savigny, which rule us still from the grave, and the objections against the more modern doctrine of acquired rights are set out in detail. Rightly the author believes that the purpose of private international law is to find the proper connection between a set of facts and a legal system, and not to determine the spatial application of rules of municipal law. For this, he holds that the proper connection must be a functional one. The component parts of the modern rules of private international law are analyzed with particular clarity. Thus the various connecting factors are examined in turn, and the interpretation of the operative facts—the principal problem of characterization—is discussed in detail with copious references to decided cases. But it is not clear whether the author advocates characterization according to the municipal law (p. 92) or the Private International Law of the *lex fori* (pp. 94, 106). Following recent Italian and English trends, Dr. Schnitzer recognizes secondary characterization, but his treatment of the topic shows better than any other that secondary characterization does not exist as a problem, unless in connection with *renvoi*. Public Policy is rightly regarded as a relative factor without an objective content. The chapter on contracts is most instructive, for the Swiss theory of the proper law has borne excellent fruit in the practice of the Federal Supreme Court. The author analyzes this practice and discovers tendencies towards fixed tests in respect of the various types of contract which point to that system of laws in which the activities of the person assuming the characteristic liability are centred. Again, the chapter dealing with the transfer of movables repays a close study. The law of persons, property and succession present problems not very different from those which arose in English law. Two outstanding features of the book are, first, the inclusion of bilateral and multilateral treaty arrangements in matters of private international law and, second, an admirable chapter on jurisdiction, procedure and mutual legal assistance.

In a book of the character outlined above the comparative aspect is ever present. On the other hand, attention need not necessarily be focused on Anglo-American private law. Nevertheless, the author refers not infrequently to English law, and his statements show that he is well informed, though in a future edition the following points may require modification: on p. 126 it is stated that in English law wills and torts are usually contrasted. According to the Matrimonial Causes Act, 1937, English jurisdiction in matters of divorce does not continue when the husband has acquired a new domicile abroad (p. 339), unless he has deserted his wife. It is somewhat misleading to state categorically that illegimate children born abroad of parents are not granted maintenance (p. 400) without

[4] *Handbuch des Internationalen Privatrechts*. By Adolf F. Schnitzer. 2 Vols. (Basle: Verlag für Recht und Gesellschaft A. G., 2nd Edition, 1944.) Pp. xvi, 773.

mentioning in what circumstances the mother can obtain such maintenance. *Re Cartwright* [1939] Ch. 90 is quoted for the proposition that the testator himself cannot determine whether objects are to be treated as movables or immovables (p. 417, n. 14). This proposition is correct, but *Re Cartwright* deals with the question whether personalty in the hands of trustees of a settlement is to be treated as realty for the purposes of s. 75 (5) of the Settled Land Act and therefore as immovables for the purposes of Private International law, or whether the provisions of the Settled Land Act are ousted in English Private International Law by the distinction between movables and immovables. The principles of English Private International Law in the matters of Tort are not quite clearly stated (p. 542) and the account of the Foreign Judgments (Reciprocal Enforcement) Act, 1933, creates the impression that foreign judgments would be capable of registration even in the absence of a treaty (pp. 674, 699) and that judgments in matters of status would require registration. However, it would be unjust to stress these shortcomings which concern subject matters outside the scope of the book. The author's learning in Swiss, German, French and Italian law is prodigious, his style is lucid, and the arrangement of the book is admirable. As a text-book of Swiss Private International Law it is indispensable; as an introduction to Private International Law in general it should benefit advanced students wherever this subject is taught.

K. Lipstein.

SALMOND'S JURISPRUDENCE

The first problem which arises for consideration in reviewing this new edition of Salmond's *Jurisprudence*[5] is whether it should be edited at all. The consequences of pouring new wine into old bottles are well known. The new wine, in this case, is of highest quality, but that does not affect the question. Since Salmond prepared the seventh edition for publication in 1924, three other editions have appeared, each by a different hand. This would seem to suggest some uncertainty of approach, and the suggestion gains force from a consideration of the text of the three last editions. Professor Manning was a traditionalist, Mr. Parker an iconoclast. Dr. Glanville Williams is perhaps the closest of the three to Salmond's original attitude, but it is quite clear that he has his problems. He wants to tell the student something of the progress of juristic speculation since 1924. At times, he very properly wishes to point out where Salmond's own treatment was defective, and sometimes he substitutes his own method of approach. On the other hand, he feels that his immediate predecessor departed somewhat too far from the original plan of the book, so that Dr. Glanville Williams himself goes to some trouble to restore the original unity of purpose. With these conflicting viewpoints, it is perhaps not altogether surprising that even this tenth edition is very much of a compromise, for which the editor is certainly not to blame. There comes a point when it is wiser to leave the text substantially as the author completed it. That is what happened to Holland's *Jurisprudence*—the complement to Salmond's for several generations of law students. Even Maitland's text-books resist the labour of editors to adapt them for modern students. Possibly it is better to leave them as landmarks in the development of English legal studies.

The present reviewer is strengthened in this opinion by considering this edition of Salmond upon two specific topics. Since Salmond died, the work of Hohfeld (at that date virtually unknown in England) has deservedly come into its own, and it has been carried further by Kocourek. Salmond, however, in important respects, anticipated both, and the value of Salmond's treatise is in showing in what particulars Salmond did anticipate the more recent writers. This can be discovered from the seventh edition. The three later editions have progressively modified the text, so that to-day it contains an admirable summary and criticism of the more recent literature upon the further analysis of rights, but a method which is apt for Salmond's *Torts* is used less felicitously in his *Jurisprudence*.

Again, Salmond was unhesitatingly committed to the fiction theory of corporate personality. That followed inevitably from his analytical approach, and from the fact that his analysis is virtually confined to English law. The present editor, whilst not going to the lengths of his predecessor, explains the implications of other theories, and then concludes by suggesting that, after all, these quasi-philosophical theories of

[5] *Salmond's Jurisprudence.* Tenth Edition, by Glanville L. Williams, LL.D. (Sweet and Maxwell.) Pp. xxxi+548. 30s. net.

the nature of corporate personality are very much beside the point. This is interesting, and valuable—but it is not Salmond's conclusion.

If one puts aside this underlying problem, there can be nothing but praise for Dr. Glanville Williams' work. Lawyers are familiar with the acuteness of his intellect. This edition of Salmond furnishes abundant testimony to the width of his reading. Nothing in contemporary legal studies is so striking as the revival of interest in jurisprudence, and the main purpose of Dr. Williams' editing has been to guide the student to the relevant literature, and to explain briefly the problems which have been raised and discussed.

G. W. KEETON.

LABOR AND THE LAW

THE opening chapters of this book[6] show how intimately the English and American systems of law are connected. Chapter 2, for example, contains a detailed discussion of the " House of Lords Triology "—the *Mogul Case, Allen* v. *Flood* and *Quinn* v. *Leathem*. But as one reads on one becomes aware of the widening gap between the two systems of jurisprudence. At the present day, law seems to be a much more powerful factor in thought on industrial relationships in the United States than in this country. It is paradoxical that, in the land of free enterprise, the statute-book and the precedent-book are treated with reverence, while in a land reticulated with controls the control over stoppage of work has been abandoned. In America, there is a constant and earnest search for legal formulæ to resolve labour troubles, while in this country Defence Regulation 58AA is ignored. We tend more and more to seek for extra-judicial or quasi-judicial remedies while the American mind seeks for a comprehensive legislative code to abolish the strike and the lockout, the bad employer and the recalcitrant workman.

The labour injunction is one of the main historical incidents of the American system. This form of injunction was originated in or about the year 1880, when an equity court appointed a receiver to administer the affairs of a railroad. A strike was threatened, and the receiver applied to the court for protection against this threat to the property with which he had been entrusted. An injunction was granted *ex parte*. It was disregarded. The strike leaders were imprisoned for contempt, and the strike was broken. This device was seized upon, and quickly developed by the employers. At first it was necessary to show that the projected strike or boycott would endanger actual, physical property, but soon injunctions were granted to protect intangible interests. The abuses of this procedure became manifest, and in 1914 the Clayton Act (and its State prototypes) purported to bring about a reform. This proved abortive, and it was not until 1932, when the Norris-LaGuardia Act was passed at the beginning of the New Deal period, that the labour injunction was effectively abolished. The *bête noire* of the American unions bears some resemblance, in its origin, to our own doctrine of common employment, now in its final phase.

The American unions were further encouraged, in 1935, by the passage of the Wagner Act (the National Labor Relations Act) which aided and strengthened organized unionism. This Act has been modified, in some particulars, by the new and complicated Taft-Hartley Act, which became law in June, 1947. The book under review, which was published in 1946, does not, of course, contain any reference to this Act, but we understand that the author was one of those who opposed it. President Truman, it will be remembered, vetoed the Bill when it came before him, but his veto was overruled by the Senate. A discussion of the merits of the Taft-Hartley Act would be out of place here, but for those who are unacquainted with its provisions it may be said that it is considered to be the most significant development in the whole history of American labour legislation.

The thirteenth chapter of the book throws an interesting light on the functioning of collective agreements and arbitration. " In spite of the developments in labor relations and collective bargaining over the last ten years," the author remarks, " it is safe to say that there is still no settled American law governing the status of collective labor agreements and their enforceability. This case of arrested development may not have been particularly serious before 1935, when the NLRA became law. But now that the government has committed industry to a far-reaching

[6] *Labor and the Law.* By Charles O. Gregory, Professor of Law in the University of Chicago. Published in 1946 by W. W. Norton & Co., Inc., New York. (London: Allan & Unwin, Ltd.) Price 5 dollars. Pp. 467.

program of virtual compulsory collective bargaining we must establish some feasible techniques for the interpretation, application and enforcement of collective agreements."

Altogether, this is an excellent piece of work, comprehensive and readable. Occasionally the curious flavour of Transatlantic prose strikes the palate. The defendants in the *Mogul Case*, we are told, " put the screws on " the plaintiff company by offering " kickbacks " to shippers who sent their goods exclusively in its ships. The final chapter is headed " Where Do We Go From Here?" But these are minutiæ, and in any event we must remember that the book is written for the American public, and not as a textbook for lawyers. As an introduction to the subject, *Labor and the Law* could hardly be bettered, either for the English or for the American reader.

F. N. B.

THE CHINESE LAW OF SUCCESSION

Professor Kuonan Cheng, the learned author of this admirable compendium,[1] belongs to the group of young Chinese enthusiasts who journeyed many thousand miles to pursue their studies in the United States of America, where he obtained his doctorate in law. After extensive travels and studies in England, the Continent, and China, he returned to Shanghai as Professor of Law at the University of Fu Tan (" the dawning of light after darkness "). The present work, written in Chinese, contains the substance of his lectures on the Chinese law of succession, corrected, supplemented, and re-arranged in a form suitable for a University textbook. (The law of succession is contained in Book V of the Civil Code (Articles 1138–1225) promulgated on December 26, 1930. The law for the enforcement of Book V was promulgated on January 24, 1931. Both laws came into force on May 5, 1931. An English translation by Mr. Ching-lin Hsia and others, and a French translation by Father François Théry, S.J., both appeared in 1931.) Preceded by a Preface from Mr. Li Têng Hui and the author's Notanda, the work falls into three parts, viz. a general dissertation, the main dissertation, and an Appendix. In the general dissertation the author considers matters of political and legal theory: he deals with the meaning and nature of the law of succession, its place in the legal system of various countries, and the evolution, codification, application, and special features of the Chinese law. The main dissertation for the most part contains a statement of the Chinese law. In Chapter I, on Successors, the author treats of the classification and order of successors, the proper successional portion, the right of succession, and substituted succession. In Chapter II, on Succession, he sets out the law regarding the effects of succession, limited succession, the distribution of the estate, waiver of succession, and unacknowledged succession. In Chapter III, on Wills, after enunciating the general principles, he describes the five forms of will, and discusses the effects of wills, the position of the executor, the revocation of wills, and the compulsory portions reserved by law. The Appendix contains (*a*) extracts from certain laws, viz. the law for the enforcement of Book V, the law of Family Registration, and the Law of Factories; (*b*) extracts from certain regulations, e.g. regarding estate-duty; (*c*) certain forms, e.g. forms of wills, and forms used in the Courts. At the end of each Chapter, the author specifies his authorities, and he includes 124 problems to provide exercises for students. The authorities whom he quotes are mostly Chinese writers, but he also refers to some 18 European and American legalists, such as Bentham, Kohler, Jarman, Schuster, and Pound. He also quotes the *Chou li* (the book of rites of the Chou dynasty), the Code of the Ch'ing dynasty, the three drafts of the Civil Code, the interpretations of the Judicial Yuan, and the decisions of the Ta li yuan (the Supreme Court at Peking, 1912–27) and of the Supreme Court (at Nanking, from 1927). He makes frequent references to the laws of various foreign countries; chiefly to those of Japan, Germany, France, and Switzerland; occasionally to those of England, the United States of America, Soviet Russia, Prussia, Norway and Italy; once to those of Holland, Sweden, Spain, Portugal, and Mexico.

To students of comparative law the most interesting part of the author's commentary is probably that which relates to the special features of the modern Chinese law: these are (1) males and females have an equal right to succeed, (2) succession is divorced from the cult of the ancestors, (3) the right of succession is limited to

[1] *A Treatise on the Law of Succession in the Civil Code of China.* By Kuonan Chêng. (Chung Hua Bookshop, Shanghai. 1945.) Pp. 1+1+13+196. $3.90.

the following persons: in the first rank, lineal descendants by blood; in the second rank, parents; in the third rank, brothers and sisters; in the fourth rank, grandparents, (4) the spouse has the right to succeed conjointly with another successor, (5) the portion of the spouse varies according to the rank of the person with whom he or she succeeds, (6) the value of certain gifts previously made by the *de cujus* to a successor is to be added to the estate, (7) a successor cannot claim the value of gifts made by him, (8) a system of compulsory portions is introduced, (9) a portion, varying from one-third to one-half, must be given to the spouse and to the relatives in the four ranks above-mentioned.

J. V. Mills.

THE PUBLIC CORPORATION

The value of this reprint[8] of Sir Arthur Street's Address to the Ashridge Conference of the Institute of Public Administration is threefold. It describes concisely the full range of major activities which are covered by public corporations from the veteran G.P.O. down to the embryo Colonial Development Corporation. In the second place there are discussed some of the chief problems, raising matters of principle, which confront a large corporation which, while enjoying a monopoly, is directed by a Board responsible to a Minister of the Crown, albeit one divorced from responsibility to Parliament for the administration of the concern, instead of to a body of shareholders. Not least among these is the problem of incentives both for the work-people and for the management. Finally—and most important—the address represents the considered personal opinion of the Deputy Chairman of the National Coal Board, who, as Under-Secretary of State for Air, must have played a prominent part in the development of the Airways Corporations and earlier in another Ministry in that of the Agricultural Marketing Boards. Two conclusions invite particular attention from students of politics. The inevitability of the growth of a new civil service to staff the public corporations is predicted (pp. 16–18). The arguments advanced for and against functional representation on the Boards suggest that it is to the technician-administrator that a Minister must look for recruitment to any large scale operational board (pp. 19–20). If this is right, the danger of new political patronage may be less insistent than might be supposed from the creation of so many well-paid appointments in the gift of Ministers. Even now, the spectre of the managerial State threatens, unless ministerial powers of direction prove in practice a sufficient safeguard.

E. C. S. W.

BRITISH YEAR BOOK OF INTERNATIONAL LAW

Nearly half the enormous bulk of this volume[9] is taken up by notes, many of them of topical interest, as for example Mr. Vallat's contribution on "The Continental Shelf," Professor MacKinnon Wood's on "The Dissolution of the League of Nations," etc. It is believed that Mr. Bathurst's note on "Jurisdiction over Friendly Armed Forces: The American Law" might profitably form the basis of an article surveying the subject generally, and in the light of recent decisions of the Mixed Courts in Egypt, as those decisions show that the rules stated by writers are lacking in clarity and precision.

Nine of the ten articles are devoted to public international law. Very remarkable amongst these is that by Professor Lauterpacht on "The Grotian Tradition in International Law." We have seldom seen Professor Lauterpacht's profound juridical sense, his gift for discriminating between what is fundamental and what is not, displayed with greater impressiveness. Many international lawyers have given up the task of studying Grotius as hopeless, being unwilling or unable to adapt their minds to the mental habits of a former age. But here the rough places are made plain, and out of the difficult writings of Grotius the Professor has woven an intelligible unity. These masterly 53 pages can and should be read, and read again, with pleasure, providing as they do such abundant food for thought. Next, there is an article by Pollux on "The Interpretation of the Charter of the United Nations." This is chiefly concerned with the provisions relating to the functions of organs of

[8] *The Public Corporation in British Experience.* Sir Arthur Street. (Institute of Public Administration. June, 1947.) Printed for private circulation. Pp. 36.

[9] *British Year Book of International Law,* 1946. (Oxford University Press. 1947.) Pp. 535. 42s.

the United Nations. Should these provisions be interpreted by these organs themselves, by a committee of jurists, or by the International Court? The writer points out the considerations which must be borne in mind in answering this question. Professor Brierly's article entitled " The Covenant and the Charter " is the Henry Sidgwick Memorial Lecture delivered in Cambridge in 1946. It is, or should be, by now, familiar to all who follow the current literature of international law, and it is not necessary to do more than marvel that so much wisdom can be compressed into so few words. There is a study by Professor Wortley of " The Veto and the Security Provisions of the Charter." It is a valuable analysis of the position and he makes the point that if a permanent member commits an act of aggression the veto may render impossible action under the Charter, but will not prevent action under the " ordinary international law." A solid and characteristically lucid article follows by Mr. R. Y. Jennings on " Government on Commission ", being a study of the present legal status of Germany. The pattern which he imposes on the facts should clear up any doubts which may have been raised regarding the position. Mr. A. H. Robertson writes on " The Legal Problems of U.N.R.R.A." and has many interesting things to say about the " lessons to be learnt " from it. Mr. Bathurst on " The Recognition of American Decrees of Nullity " deals mainly with cases of hardship resulting from the operation of the English rules about divorce jurisdiction. Dr. Schwelb writes on " Crimes against Humanity " and Professor Smith on " Booty of War." Both articles are very interesting though there does not seem to be much " real law " involved. Mr. Lyons contributes an article on " The Conclusiveness of the Foreign Office Certificate." The article runs to 40 pages and is almost entirely an analysis of the cases. It is none the less useful for that, but it is a pity Mr. Lyons does not deal with the questions why the certificate should be conclusive, and on what principle, especially of the law of evidence, and whether any rules of interpretation should be applied in construing it.

Mr. Rowson brings a somewhat exhausting volume to a close with a study of Italian Prize Law, 1940–1943. He is an authority on the subject of prize law and has devoted himself to original research into it. Mr. Fawcett has penetrating notes on cases in the English courts since 1945 on private and public international law. Mr. Clive Parry occupies 100 pages with a collection of constitutions of international organizations with helpful notes therein. Suffering slightly from indigestion after so much rich material we turn gratefully to the Book Reviews and the Index.

J. M. J.

JUSTICE AND ADMINISTRATIVE LAW

Professor Robson is the author of several books on Public Law and Government and the editor of others. But his reputation as a legal author rests primarily upon his *Justice and Administrative Law,* which was first published in 1928. Nearly twenty years later, fresh from a period spent in Whitehall as a temporary civil servant in more than one department, the author has rewritten much of his book and added two new chapters.[10] He gives in Chapter 3 a comprehensive survey of the field of administrative tribunals with comments on their working which every student of Public Law will welcome. One new chapter is devoted to the Committee on Ministers' Powers, partly to a lengthy account of Professor Robson's evidence and cross-examination and partly to a discussion of the Report of the Committee. Much may be forgiven to a disappointed advocate, but it is a pity that the author did not invite one of his many friends to comment on his account of his evidence before the Committee before he gave it to the world. To compensate for this lapse there is a valuable contribution to the controversy about powers of judicial and quasi-judicial decisions here and later in the book. However attractive such a division may appear, it is now apparent—and Professor Robson has no doubts about this—that it is too unreal to be applied in practice.

The other chapters which attract most attention to those who are familiar with the first edition are the concluding two on the *Attitude of the Judiciary,* which is wholly new and on *Trial by Whitehall,* which is largely rewritten. Towards the end of the latter chapter the author summarizes his conclusions. Perhaps the best way of assessing the merits of the book as a whole will be to examine some of these.

[10] *Justice and Administrative Law.* By William A. Robson, Ph.D., LL.D., B.Sc. (Ec.), 2nd ed. (London: Stevens & Sons. 1947.) Pp. xxxii + 554. Price 25s.

His first conclusion is that administrative tribunals rather than the courts should settle disputes arising " through the obstructive resistance by vested interests to the execution of a new policy of social improvement ", as for example town and country planning. This invites the answer that the more bitter the conflict, the greater the need for it to be resolved by methods which approximate as closely as possible to judicial standards in every case where there is a *lis inter partes*. Nor would Professor Robson seem to disagree with this, for he goes on to recommend the use by administrative tribunals of several safeguards borrowed from court procedure, including the right of appeal. Further he would secure independence for tribunals by requiring a minister to publish open letters of reference for their guidance and otherwise would exclude his intervention with the process of adjudication. Social improvement usually arouses political passions; invariably it injures some existing interests. It is difficult to believe that tribunals which are appointed by a political minister, however carefully they are isolated from his directions, can fail to arouse suspicion in the breasts of litigants, especially those to whom that minister and all his works are anathema. If there is a justiciable issue, the traditions of judicial impartiality and independence matter far more in a free society than the social progress which Professor Robson deliberately couples with administrative efficiency. In the long view efficiency can best be maintained by approved standards, the validity of which can be tested by judicial review in the ordinary courts. But if the issue is not justiciable, then Parliament should place the decision fairly and squarely on the minister or his agent, as indeed the courts have decided in the case of the New Towns Act, 1946. A court, by whatever name, is not the appropriate medium for determining policy.

This is not to deny the value of administrative tribunals to settle such matters as claims to individual benefits, especially where a wide discretion has been left to the administrator. In these matters courts function reluctantly whether as tribunals of first instance or on appeal. There is however need for review by judicial process to ensure that all relevant factors are examined and an administrative tribunal can probably do this better than an inferior court. Points of law but rarely arise and when they do a sufficient safeguard is provided by an appeal on law, not on the facts, to a judge, as in the case of war pensions. It may be conceded that there is not much difference between a High Court Judge and a legal umpire, such as the Insurance Commissioner. The umpire seems to be the chosen instrument at the present time.

Professor Robson feels that the creation of new standards rapidly in a hitherto unexplored field can best be entrusted to an administrative tribunal; such a tribunal with centralized jurisdiction is more likely to secure consistency in its decisions than a number of unco-ordinated summary courts. With this one would agree, especially as he concedes that, where the standard is a matter of law (or, as he says, " the judicial element predominates ") the court is the proper tribunal. Many of his other recommendations will secure acceptance in legal circles with one important exception. It is the author's unshaken belief that the chaos of administrative jurisdictions can best be tidied up by an English counterpart of the *Conseil d'État*. It was the rejection of this view which caused his differences with members of the Committee on Ministers' Powers, nor have the intervening years made him willing to recede from his position. But the chaos of tribunals is deliberate. It is the English tradition to devise the most convenient machinery piecemeal; however unpalatable this may be to students of constitutional law, it usually produces the right answer. It does not follow that a tidy hierarchy of administrative tribunals with an appellate court at the top seeking to impose uniformity throughout would secure more justice than the present system. Those who think like Professor Robson would do well to ask themselves whether a central administrative tribunal, had such existed in 1916, would have reached a conclusion so favourable to administrative organs as was that of the House of Lords in the *Arlidge Case*. The author hardly discusses the point that it is not a necessary or even an unusual feature of a system of administrative law in other countries to deprive the ordinary civil courts of their control, as Sir Ivor Jennings has been at pains to emphasize.

These are controversial matters and whatever view may be taken, lawyers remain under a debt of gratitude to the author for his new contribution to a field of study in which he has so long trodden the hard path of a pioneer.

E. C. S. WADE.

COMPARATIVE LAW

THIS is the first of a series of " Cambridge Studies in International and Comparative Law "[11] under the general editorship of Professor Gutteridge, Professor Lauterpacht and Sir Arnold McNair.

Professor Gutteridge first distinguishes between " Descriptive Comparative Law," which merely furnishes information about various legal systems, and " Applied Comparative Law " which has some practical aim in view, such as law reform. He then demonstrates the value of comparative studies in several legal fields, but with particular reference to Conflict of Laws and the Law of Nations.

In an expert description of the techniques of comparative research, the reader is advised how much weight to attach to codes, case law and opinions of legal text writers in civil law countries, and is informed of the differences between the Continental and English methods of statutory interpretation. We wonder if the author would support the adoption in England of the continental technique of reference to " travaux préparatoires." Certainly, if England were to follow the lead of the United States by using this method, not only could the judges give effect more readily to the intentions of the legislature, but the most serious obstacle to the uniform interpretation of international statute law would be overcome.

In the latter part of the book Professor Gutteridge deals with the best known function of the comparative method, its use in connection with the unification of private law, and traces the origin and development of the movement for unification. Seeking an explanation for the admittedly disappointing progress so far made, he finds that, great though the inherent difficulties are, if due care is exercised in the choice of the sphere of unification, and greater patience shown in the preliminary stages, especially in the winning over of the interests affected, more success can be expected from future attempts. Surely here is a task for some agency of the United Nations.

No one reading this illuminating work can fail to be convinced that comparative legal study has an important rôle to play in the future. It seems that the greatest obstacle to full British co-operation is the apathy of the legal profession. Yet, with the ever-increasing economic ties between nations, comparative law is of great importance to the practical lawyer. If he is to brief his agent abroad satisfactorily, if he is to interrogate the expert on foreign law in the witness box, he must be familiar with civil law concepts. This knowledge is even more necessary for officials of the United Nations and governmental agencies of the Allied armies of occupation. English lawyers (in sharp contrast to their American colleagues), by their slowness in recognizing the importance of administrative law in the domestic sphere, lost ground (perhaps irretrievably) to political scientists and public administrators. History must not be allowed to repeat itself in the international arena.

With the goodwill of the legal profession in support, law teachers in the British universities could be relied on to organize the teaching of comparative law. Some revision in curriculum would be called for. A broad outline course in the history of legal institutions from the era of Rome to the present day, evaluating the link between modern civil law and classical Roman law, and familiarizing the student with civil law concepts, is required in the first year. Moreover, some topic could later be treated comparatively to rid the student of his smug provincialism and perhaps replace it by a healthy scepticism. Suitable topics would be Family Law in Conflict of Laws (using Dr. Rabel's recent work), causation, or the law of privacy in tort.

Professor Gutteridge indicates, however, that the general situation is not discouraging. The difficulties caused by shortage of materials can be overcome by the pooling of existing library resources and by judicious selection of topics. Perhaps some developments since the publication of this book may be regarded as happy omens, for example, the successful Anglo-French legal conference held at the Law Society's Hall in June, 1947, the plans made for the setting up of the Institute of Advanced Legal Studies in London and the arrangements recently made by the Library of Congress to bring and keep up to date their bibliographies of South American law (the only ones in the English language). And may we not also be encouraged by the promise in the general introduction to the book now under review, of further volumes on comparative law in the series so auspiciously commenced by Professor Gutteridge?

H. STREET.

[11] *Comparative Law: An Introduction to the Comparative Method of Legal Study and Research.* By H. C. Gutteridge, LL.D. (Cambridge University Press. 1946.) Pp. xii 208. 12s. 6d.

INTERNATIONAL LAW CASES

As promised in his Preface to the 1941–2 volume of the *Annual Digest*, Professor Lauterpacht has provided a supplementary volume[12] containing a comprehensive index of the first 10 volumes of this world-renowned publication, together with a number of further cases decided during that period but previously omitted. The Editor's belief that the consolidated index will provide practitioners and students with a useful tool is plainly well founded. Perhaps, however, attention might have been drawn to the fact that the cases in the supplementary volume itself are not covered by the consolidated index but only their own index.

The 175 additional cases are by no means mere " sweepings." There are several of outstanding interest, not least of which is *Watson* v. *R.C.A. Victor Co. Inc.* from the Sheriff Court of Aberdeen on the status of sea-planes in maritime law. One or two are full accounts of decisions only briefly noted before. An example is the important Norwegian case of *Campuzano* v. *Spanish Government* in which the Supreme Court had to adjudicate upon the rival claims of the Republican and Nationalist Governments to the Legation Archives.

The price, 55 shillings, is discouraging to all but devotees of the *Annual Digest* but, fortunately for its well-wishers, these are numerous.

C. H. M. W.

GREAT BRITAIN, THE UNITED STATES AND THE FUTURE

It is a sad commentary on the time lag in British publishing that this obviously alert little volume[13] should appear in the spring of 1948 and not contain a single reference to the Marshall Plan. It is also a commentary on the fast tempo of change in international affairs. To the serious student and writer on current topics battling against such difficulties every sympathy is due. The question remains, however, to be answered: can a topical study so swiftly dated retain any value for the reader?

The answer in the case of Dr. Tyler's volume can certainly be yes. The power factors with which he is mostly concerned have not been transformed in this period, even if they have been modified. There is consequently much in his analysis of " Big Three " relationships that remains of value. In addition the cool realism of his handling of the deceptive elements of " geo-politics " is a model of its kind. Into a small space he has packed a great deal of wisdom and information. The inevitable omissions are consequently more grounds for notice than complaint. They include Palestine, raw materials (e.g. U.S. interest in Congo uranium), the relations between civil and military aviation (cf. British-American disputes over " freedoms of the air ") and telecommunications. Finger-posts to some of these, however, are contained in the convenient bibliography which comes as an appendage to the text.

H. G. Nicholas.

THE CRISIS IN THE LAW OF NATIONS

This book[14] consists of five lectures given at the University of Istanbul in 1946 on the basis of and gradual change in the development in International Law, with special reference to the law of war. The book also contains a reprint of an article on the United Nations and a general plea as regards the future development of International Law. Professor Smith, rightly in our view, stresses the need for a common conception of right and wrong in international affairs, and indicates that any moral disintegration must be followed by a similar legal disintegration; not that Professor Smith regards International Law as static, the illuminating account of doctrine of continuous voyage of the development of war at sea makes this plain.

The statement at p. 67 from Vittoria with regard to the indirect killing of non-combatants (at the top of p. 68) must be read in connection with the statements at pages 69 and 70, namely that Vittoria and other writers of his age were considering the nature and the means of waging just wars; as the author says at p. 79, the pity of it is that " fifteen centuries have not been long enough to teach the world that St. Augustine was right in saying that power uncontrolled by justice is no better than brigandage on a vast scale."

[12] *Annual Digest and Reports of Public International Law Cases*, 1919-1942. (Butterworth & Co.) Pp. xxvi and 550. £2 15s.

[13] *Great Britain, the United States and the Future*. By J. E. Tyler. (London: Stevens & Sons. 1947.) Pp. xi, 130. 8s.

[14] *The Crisis in the Law of Nations*. By H. A. Smith, D.C.L., former Professor of International Law. London University. (London: Stevens & Sons. 1947.) Pp. 102. 7s. 6d.

Because the reviewer agrees with this statement he finds the dismissal of the Nuremberg Trials in three pages somewhat surprising, since at least those trials asserted that the distinction between lawful and unlawful war is a matter of public concern. Whether such trials will be " a precedent for the customary development of law of nations," (p. 47) or not, seems to us not to be of first importance, since the distinction between the lawful and the unlawful use of force may well be based on the nature of things and of society in general, and not merely on precedent which in any case is not of a binding character in International Law.

The book is one which can be read with interest and profit by experts and laymen interested in the pressing problems which confront the modern world.

B. A. W.

THE PROVINCE AND FUNCTION OF LAW[15]

It would be an unworthy impertinence to call this short notice of Professor Stone's latest and greatest book a review, for limitations of space and materials do not allow for an adequate appreciation of the work. Here is a book written by an English lawyer who, starting from the threshold of the common law, explores the realms of legal theory in its relation to history, economics, politics and sociology in a successful attempt to assess their implications for the legal system under which we live. One can find good reasons why no similar book has previously been written by one nurtured in the cradle of the common law, of which the best, perhaps, and one implicitly acknowledged by the author himself, is the long and deep perspective which he achieved through the fortune of his close association with Roscoe Pound. To read this book is to recapture the echo of that outstanding seminar in jurisprudence which Pound and Stone conducted at Harvard Law School, and which the writer had the privilege of attending in 1934–5.

The learned author builds his book on the relation of law to logic, to justice and to social control. In the first part he deals with analytical and pure theories of law; in the second chiefly with natural law, utilitarianism, individual and social, and the theories of justice of Stammler, Hegel, Kohler and Duguit; and in the third part with sociological jurisprudence, the historical school and the conflict of interests arising from the function of law as an organ of social control. Professor Stone is in an understandable revolt against older juristic trends, and allies himself with the social aspects of contemporary thought. His revolt opens with an attack on the conventional attitude towards jurisprudence, which in his view should be " the lawyer's examination of the precepts, ideals and techniques of the law in the light derived from present knowledge in disciplines other than the law."[16] Yet while he cites in support the remark of Mr. Justice Holmes: " To be master of any branch of knowledge you must master those which lie next to it "[17] (a process which would logically involve the mastery of all knowledge), the author clearly realizes the impossibility of applying this precept in fact.[18] A separate existence is denied to historical jurisprudence, since it is considered necessarily a part of sociological jurisprudence. While the learned writer appears to reject (at pp. 36–7) the jurisprudence of a particular time and place, his acceptance of the sociological approach argues against universality, for sociology is essentially relative and factual.

There are in Professor Stone's book excellent reviews and critiques of so many schools of jurisprudence and legal theory that it is difficult to select one as outstanding from the rest. His sympathetic treatment of Austin's jurisprudence is as welcome as it may be considered perhaps unexpected in a book in revolt against the traditions of the past. But the objection which the learned writer raises, in dealing with Roguin (at p. 87) to the identification of analytical jurisprudence with the actual concepts of a legal system overlooks the fact that such identification was the means, and perhaps the only means, by which jurisprudence in general and Austin's jurisprudence in particular was made acceptable to the hard-headed common lawyer of the mid-nineteenth century. An analysis, after all, presupposes something to analyse. If a weakness exists in the first part of Professor Stone's book, it is in his treatment of Hohfeld, particularly in the first paragraph of page 117. " Corporeal " in the middle of the preceding page must surely be intended for " incorporeal."

[15] *The Province and Function of Law.* By Professor Julius Stone. (London: Stevens & Sons, Ltd. 1947.) £3 10s.

[16] At p. 25.

[17] Id.

[18] See *id.*, pp. 28-29.

The common lawyer in Stone rises triumphant in his brilliant handling of case law in Chapter VII on The Fallacies of the Logical Form,[19] a section in which he makes a most valuable contribution to the theory of his native system. One's only suggestion for the improvement of this chapter would be to split it so as to deal with Gény and the Pandectists separately from the common law.

The second part of Professor Stone's book, called "Law and Justice," deals with "the evaluation of law in terms of standards of goodness or badness external to the law itself."[20] In it are treated natural law, Kantian individualism and the utilitarian theories of Bentham and Jhering. The learned author wastes little sympathy on Stammler's social idealism. It would, perhaps, have strengthened the author's exposition of Stammler's conception of society as a "community of free-willing men" (at p. 321) to point out that the conception is based on an unjustifiable assumption that such men wish to join the community. In other words, free will should relate back to the question of whether man is compelled to belong to society. The same assumption, indeed, underlies many theories of social justice and social contract, and is in no sense Stammler's monopoly. It is, perhaps, a little hard, and savours of Hegel, to say with the learned author (at pp. 325–6) that the terms "arbitrary" and "just" are mutually exclusive. There is no need to define the one in order to discover the other. A judgment may be either arbitrary or just, or both arbitrary and just.

When Professor Stone writes of sociological jurisprudence, particularly in its American pattern, he does so with authority, insight and experience. The learned author goes to considerable pains to shake his own conviction that no distinction is maintainable between the sociology of law and sociological jurisprudence. But a distinction which receives from him little attention, and which to the writer appears sound, is the fundamental one that sociology is a factual science, law a normative one; and while the sociology of law is concerned with observing and assessing objectively the relation of law to society, sociological jurisprudence, whether in the form of Duguit or Pound, is concerned with using the facts recorded by sociology as a basis for evaluation of effectiveness in achieving what may broadly be called a theory of justice. Professor Pound's classification of interests to be secured into individual, social and public is criticised (pp. 491–2) on the ground that "public" is a superfluous category. One senses in this rejection of "public" interests the influence of Duguit and, perhaps, of Kelsen. To the less enlightened writer the threefold division retains its validity; for public interests are often those only of the political party in power, and are narrower, and at times opposed to, the wider class of the interests of society at large. This is particularly evident in cases of government by dictatorship. Whether the various classes of interests are in every case reducible to the same plane of evaluation is an independent question.

Professor Stone is master of the vivid phrase. His "Trojan horse" description of Bentham (p. 268) is already well known in London; while of bureaucracy he could write (at p. 481), "The most self-evidently necessary modern laws seem to cry out for elaborate administrative *layettes* as soon as they leave the parliamentary womb." On the other hand, his vocabulary is at times rather indigestible, including such unaccustomed fare as "existential" (p. 84), "oughtness" (p. 93) and "extensity" (p. 282). In the wealth of footnotes and references which the author provides there are inevitably some misprints. But *The Province and Function of Law* is not only a well-written book crammed with stimulating ideas. It is a work of the greatest value to students of jurisprudence and legal theory, as the reviewer has found in a course of lectures which he gives in the University of London.

R. H. Graveson.

WAR AND CIVIL LIBERTIES

It is an ambitious task to discuss the theme of civil liberty in war from the experience of more States than are in some four-score pages[21], of which nearly half deal with India alone. The account of British experience suffers from too much emphasis on D.R. 18b and far too little attention to D.R. 55 (control of industry, including

[19] See Professor Winfield's review of this chapter (which, with Chapter I, was published separately) in the *Journal of Comparative Legislation* (3rd series), Vol. 27, Pts. III and IV, p. 134.

[20] P. 209.

[21] *War and Civil Liberties.* By M. C. Setalvad. (Indian Council of World Affairs, New Delhi, and Oxford University Press.) Pp. iv. and 86. 3 rupees.

rationing and licensing). Of special interest is the discussion of the Indian counterpart of *Liversidge* v. *Anderson—Keshav Talpade* v. *Emperor* 6 F.L.J. 28. In the author's opinion an adverse decision of the Federal Court was flouted by an irresponsible Executive. The conclusion that such a course could only have taken place under a régime entirely impervious to public opinion and to ideas of constitutional propriety is one which will convince few who recall the demand for wholesale internment which was insistent in England in the early summer of 1940; but the applicant in *The King* v. *Home Secretary, ex parte Budd* [1942], 2 K.B. 14, would not agree with this criticism.

This small book shows that the author has made good use of the limited number of published works and articles on the subject and it is useful to have added to this literature the views of a writer from the Dominion of India. E. C. S. W.

AN INTRODUCTION TO INTERNATIONAL LAW

This new Student's Book[22] on International Law by J. G. Starke was opened in the lively hope that it might fill a long-standing want. For there is no modern book in English to bridge the gap between Brierly's admirable but slender Introduction and Oppenheim's two masterly volumes. It cannot be said that Mr. Starke has provided that bridge.

The book started under the handicap of appearing at the wrong moment. Published in May, 1947, it no doubt went to the printers much earlier—at any rate too soon to include more than slight references to the United Nations Organization. As the book was designed not only for students but as an elementary textbook for practitioners in the shape of international officials and recruits to the diplomatic service this is particularly unfortunate.

Some chapters will be helpful to those who do not intend to study the larger works, e.g. those on Sources, State Succession and Jurisdiction. Others are scarcely adequate and important questions of principle are often excluded on the ground of being too detailed for treatment in an elementary book. Again the chapters on War and on Neutrality are extremely slight—so slight that it would have been better not to attempt the exposition of individual doctrines such as ' Continuous Voyage ' but to confine the chapters to a general discussion of the place of War and Neutrality in the international system. The criminality of War might have then received more illuminating treatment than that accorded to it on p. 261.

A detailed review would be out of place in this *Journal*. Otherwise, there would be a number of points to which exception must be taken. For example, the Hague Conference of 1930 on p. 130 and the Declaration of London on p. 283 are cited as authority without any warning that they do not form part of conventional law. Again on p. 50 it is said that Blackstone's dictum on the incorporation of international law in English law was " never again expressed in language so positive and unqualified ", whereas it was constantly reiterated in the nineteenth century until *R.* v. *Keyn*. And surely the student should have been put in touch with the important articles by McNair, Lauterpacht and Holdsworth on this subject?

Mr. Starke's first edition must therefore be regarded as having only partly fulfilled its purpose.

C. H. M. Waldock.

THE HINDU JUDICIAL SYSTEM[23]

Sir S. Varadachariar, Judge of the Indian Federal Court, delivered the inaugural lectures of the Radha Kumud Mookerjee Endowment at Lucknow University. The lectures were clearly intended for students with a good knowledge of Sanskrit, and for the general public they present difficulties owing to the failure of the author to translate in his own words many of the Sanskrit passages cited. There is no division into chapters, and the sections are inclined to overlap, but no rearrangement would simplify greatly the task of bringing on to a small canvas a picture of the judicial system of numerous dynasties large and small in different parts of a sub-continent, and spread over a period of seventeen centuries.

[22] *An Introduction to International Law*. By J. G. Starke. (London: Butterworth & Co. 1947.) Pp. xiv and 293+23. £1 5s.

[23] Radha Kumud Mookerjee Endowment Lectures, 1945, on The Hindu Judicial System, delivered by S. Varadachariar, Kt., Judge Federal Court. (Lucknow University, 1946.) Pp. x, 267.

Sir S. Varadachariar has however succeeded in giving an intelligible picture of the judicial system of the Hindu law books. He has also some authority for his view that it was a real working system at least in some places at some times, and he has traced survivals in some of the Indian States at a much later date. In his opinion there was some uniformity in legal procedure in Hindu India in a period extending roughly from the fifth century B.C. to the seventh century A.D., and in some parts of the country till the twelfth century A.D. Justice was administered by Courts of varying authority composed principally if not entirely of Brahmins, and there was some form of appeal from lower to higher Courts and ultimately to the King.

The rules of procedure in these Courts can only be surmised. There is some unanimity among commentators that there are " four ways of decision," and that these are Dharma, Vyavahara, Charitra and Rajasasana, but there is no unanimity as to the meaning of any of these terms except the last which means " Royal edict." The learned lecturer inclines to the view of Brihuspati and Katyayana that Dharma, a word closely connected with religion and divine truth, means in practice (*a*) adjudication with reference to probabilities on the admission of parties or on their oaths, and (*b*) adjudication by ordeal; that Vyavahara means adjudication on evidence, oral and documentary; and that Charitra means (*a*) adjudication on circumstantial evidence and (*b*) adjudication based on usage.

There is no doubt that ordeal if not torture was resorted to, and that there was a preference not uncommon among primitive races for a decision based on agreement rather than on evidence. Oral evidence in particular was regarded with suspicion. It may be, however, that the interpretation of Vyavahara as evidence is too narrow, for the word normally includes all judicial procedure. The reliance on custom has been carried on and even developed in Anglo-Indian law.

It is probable that the Courts were empowered to deliver judgment in Civil actions, but in Criminal cases it was the King alone who could punish. It may be surmised that he generally acted on advice, but he was in theory unrestrained by ordinary rules of law.

Although Sir S. Varadachariar will not accept Sir Henry Maine's dictum that the Brahmins claimed " to be free of the criminal law which they themselves prescribed," he comes to a very similar conclusion, for he allows that the Brahmin could not be put to death or be subjected to physical pain, and spiritual penalties are not always feared greatly by malefactors. But the learned author is prejudiced in favour of Brahmin rule and Sir Henry Maine was not.

Throughout the book parallels are drawn from the Courts in Greece, Rome and mediæval England, but there is too much uncertainty as to the details of Hindu procedure to find more than a general resemblance.

In the concluding section the review of the evidence that the principles of the Shastra were actually practised gives an interesting account of survivals in Vijayanagar, Tanjore and elsewhere, but also shows how very little reliable material jurists can expect to find in travellers' tales, inscriptions or early literature.

A. G. P. PULLAN.

THE PROCESS OF INTERNATIONAL ARBITRATION

THIS book,[24] as its title indicates, deals with arbitration in its technical aspects. It is, moreover, primarily concerned with arbitration *stricto sensu* and does not cover judicial process before the International Court. Reference is of course made to the jurisprudence of the International Court so far as it directly touches the process of international arbitration but the book does not in general deal with the process of the Court even by way of comparison. This fact lessens the interest of the book for the general reader who will, however, find useful material in some of the chapters, e.g. Chapter 2 on Minimum Procedural Standards. The author has very rightly based himself mainly on the actual cases and his book will no doubt be useful for general reference as well as for practitioners.

C. H. M. WALDOCK.

[24] *Process of International Arbitration.* By K. S. Carlston. (Columbia University Press.) Pp. xiv, 318. $4.50.

AVIATION ACCIDENT LAW

THE author, Mr. Rhyne, is a member of the District of Columbia Bar and is a recognized authority on Aviation Law in the United States. This work[25] comprises a thorough review of all aspects of the Law concerned with aviation accidents. The volume of case law on this subject, which has grown up in the United States in the last 20 years, emphasizes the extent of commercial flying in that country, and the fact that a number of English cases are cited serves as a reminder of the influence of the English Common Law throughout the United States; even such an old friend as the Rule in *Rylands* v. *Fletcher* finding its place. This is an instructive and absorbing work which will be found most interesting to all students of this subject.

REX D. HYEM.

INTERNATIONAL LAW

THE revision of Volume 1 of this well-tried students' book[26] has been excellently done by Mr. W. L. Walker. His replacement of old by modern leading cases has been judicious, with the result that the book, though now up to date, retains the essential frame-work of Pitt-Cobbett. The previous editor had placed Pitt-Cobbett's commentary in larger type than the summary of cases in order to emphasize the character of the book as a textbook. Mr. Walker has wisely returned to Pitt-Cobbett's own method by setting the case summaries in the more prominent type, though the value of the book as a students' textbook is unquestionable.

C. H. M. WALDOCK.

THE LAW AND CUSTOM OF WAR IN THE AIR

THE second edition of this book[27] was published in 1933, and, in view of world events in the intervening period, it is not surprising that the author has found it necessary substantially to re-write his work, which has been enlarged considerably in its new edition. Happily, he has thought fit to retain all that portion of the earlier editions which dealt in detail with international usages of the War in the Air, established during the 1914–18 War, and these chapters, in addition to providing an interesting historical background, serve as an introduction to the important developments brought about by the 1939–45 War.

Mr. Spaight is such a well-known writer on aeronautical subjects that he needs no introduction to British readers, his works extending as they do over the last 36 years. It will at once be apparent to the new reader that for many years he has made a close study of the international aspects of the War in the Air.

It is impossible in a short review to comment on more than a few topics. Undoubtedly the greatest development in the sphere of air warfare during the late war was in strategic bombing. When Britain stood alone in 1940 and 1941, her principal effort was directed towards the establishment of a powerful Air Force which could carry the war to the heart of Germany, in order to reduce her capacity to make war, by means of the steady and ever-increasing paralysis of her war industries. Whilst emphasizing that nothing happened in the second world war to alter the objection in international law to indiscriminate bombing, the author contends that " if in no other way than by target-area bombing can a belligerent destroy his enemy's armament centres and interrupt his enemy's process of munitionment, then target-area bombing cannot be considered to offend against the principles of the international law of war," and he concludes that it could be condemned only if it involved acts repugnant to humanity. In support he points out that the bomber offensive was approved generally by public opinion in Britain and America, and that " there was no such widespread doubt about it as there was about the subsequent resort to atomic bombing, which did gravely disturb the public conscience."

The advent of the atomic bomb has given rise to new considerations. Mr. Spaight has carefully analysed the arguments for and against this form of warfare, pointing out that target-area bombing depends ultimately for its justification on the impracticability of bombing a military objective under modern conditions of heavy defences without bombing the area in which it is situated. Against this, by the use of atomic

[25] *Aviation Accident Law.* By Charles S. Rhyne. (Columbia Law Book Company, 1947.) Pp. x, 315.

[26] *Pitt-Cobbett's Cases on International Law.* By W. L. Walker. (Sweet & Maxwell, Ltd.) Pp. xx and 416.

[27] *Air Power and War Rights.* By J. M. Spaight, C.B., C.B.E. Third Edition. (London: Longmans Green & Co. 1947.) Pp. viii. and 523. £1 5s.

bombs, the area affected is enormously extended and he suggests that the argument that this is militarily necessary, because otherwise the actual objectives could not be destroyed, is rebutted by the experience of the bomber offensive in Germany—" the Harris method " as he calls it—in which the object was substantially attained without resort to atomic bombs. The author concludes this topic by expressing the view that to approve atomic bombing would be to confess that the denunciation of indiscriminate bombing by the Hague Declaration was hypocritical and insincere, and suggests that the right course is to ban by international agreement the development and use of the atomic bomb and all other projectiles embodying the same principle and to organize a system of international supervision and inspection. The failure so far of the United Nations Organization to implement such a policy is only too apparent.

It would appear from reading the work that the present rules of international law, for the regulation of air warfare, are inadequate. It may be that in the course of time an attempt will be made to modernize the proposed Code of Air Warfare Rules which were prepared in 1922 but never adopted by the nations which participated in its drafting.

R. D. Hyem.

A DOMINICAN TREATISE ON THE LAW OF CONFLICT OF LAWS

The American Continent is the domain of the lex domicilii. Three countries, however, form an exception to the rule and have based their system of private international law upon the principle of nationality: Brazil, Haiti and the Dominican Republic. The Dominican Republic is at present preparing a reform of its Civil Code. The present Code is a Spanish translation of the French Civil Code with a few minor amendments. As the law of nationality forms an essential part of the French system, it has since the introduction of the French Codes in 1845 maintained its hold upon the Dominican Republic. The Codigo Bustamante which has been introduced in the Dominican Republic leaves it open to the individual states adopting the code to adhere to the principle of domicile or to that of nationality. The principle of nationality has, therefore, been retained in the Dominican Republic, notwithstanding the reform of the law of Conflict of Laws in 1929.

The author of the present attractive little book[28] is a distinguished refugee scholar from Spain, now teaching as Professor at the School for the Diplomatic and Consular Service of the Dominican Republic. His book consists of a course of lectures on the most important problems of the law of conflict of laws, including the conflict of criminal law and of administrative law. It contains an attractive statement of the most important rules of the Codigo Bustamente together with a short, but impressive and colourful account of the main problems of contemporary international legal practice in this field. The author describes some of the bitter experiences made by refugees from Spain. In 1939 after the victory of Franco all marriages celebrated in Spanish Republican territory during 1938 and the first quarter of 1939 were declared to have been invalid. Similarly divorces obtained in these territories were declared to have been of no effect. Problems of this type have not yet engaged the attention of the Courts of this country, because the number of Spanish refugees who have come to this country is comparatively small, the majority naturally having sought refuge in the South American countries whose Spanish civilization was naturally more attractive to them. Professor de Galindez has through his experience become a fervent adherent of the lex domicilii. He pleads with great eloquence for its introduction in the Dominican Republic. He sees in it a rule of freedom for the immigrant who wishes to settle in the country of his choice and to be treated there in the same way as its citizens. One may well doubt whether the English and American doctrine of domicile does always come up to these high expectations: Professor de Galindez obviously is thinking in terms of the Continental conception of domicile. There can, however, be no doubt that he has presented the case against the rule of nationality with great force. One may well wish him success in his endeavour to advocate the adoption of the principle of domicile in the Dominican Republic whose hospitality to refugees of all creeds and races has been outstanding in recent years.

E. J. Cohn.

[28] Galindez, Jesus De. *Principales Conflictos de Leyes en la America Actual.* (Buenos Aires: Editorial Vasca Ekin, S.R.L. 1945.) Pp. 335. $5.00.

THE STUDY OF ROMAN LAW

THE purpose of this book[29] is explained in the Preface. It is not a second edition of the author's short treatise published in 1938 under the title *Die Krise des römischen Rechts und die romanistische Rechtswissenschaft,* but a much more comprehensive work, in which, however, most of the earlier work is reproduced and, in particular, the leading idea that the Roman Law is an expression of European culture. The occasion of the earlier publication was the hostility to Roman Law exhibited in art. 19 of the Nazi party programme. But this was no isolated event. It had been preceded by a period of unfriendliness or at least indifference on the part of lawyers. National socialism is gone, but this attitude to Roman Law remains.

" The desire to understand this state of mind and the consequent opposition to Roman Law " (writes Professor Koschaker) " turned my thoughts to the history of its study. I have sought to explain it not in detail, but with reference to the leading ideas which have from time to time affected its position in Europe and its influence in other lands. Further, since it has always been the practising lawyers who have maintained the tradition of the Roman Law, I have undertaken, if I am not mistaken, for the first time, an enquiry into the sociology of lawyer-made law (*Juristenrecht*), looking for conclusions to be derived from a comparative study of Roman, Anglo-American and French Law. Along with this I have attacked the problem of the Reception in Germany and other countries. In this way I hoped to come to grips with the problem why this law of a bygone age after centuries of eclipse was brought to light by the Glossators of Bologna; why it continued for another eight centuries to enrich the practice and theory of the chief European systems of law; why in spite of a certain learned revival in Germany and elsewhere it is in danger of ceasing to have any influence on lawyers. Lastly, I have suggested ways and means—not new indeed but fit to be borne in mind—calculated to repel this danger."

The history of the Roman Law and of its study in the past nine centuries is the history of the forces which have determined its content and effect doctrinal and practical. This is the main theme of Professor Koschaker's book. It falls into periods (which, of course, overlap), for which the titles of chapters conveniently supply an index—The Glossators and their predecessors; the Commentators; the Humanists; the Law of Nature, particularly in Germany; Savigny and the German historical school. The problem of the Reception, and *Juristenrecht,* though of interest in themselves, perhaps receive an attention somewhat out of proportion to the main idea. Either of them might well be the subject of a separate treatise. Unlike the topics enumerated above they do not readily fall into a scheme of chronological sequence.

The study of the texts of the Roman Law and in particular of the Digest with an intensity of effort unsurpassed in any later age, was the particular contribution of the Glossators. It was one aspect of the eleventh-century renaissance, which, like the revival of letters under Charlemagne, was a Latin renaissance, but, unlike it, was lay rather than clerical in character. Further, it was, in the widest sense of the word, scientific rather than literary. It came to be concentrated in three Universities, Paris for theology, Salerno for medicine, Bologna for Law. The Glossators were not mere bookworms. They had their contact with practice as Judges, consultants and advocates. The transition to the School of the Commentators or Post-glossators was gradual not catastrophic. To these belongs the credit of adapting the Roman Law for application in the Courts and setting it on a course, which it was to pursue for five or six centuries. The great renaissance of the fifteenth and sixteenth centuries disturbed the peace of the legal world. The scholars of this age, known as humanists, studied Roman Law as literature and in relation to its historical background. They jeered at the bad Latin of the Commentators and their disregard of classical law. The humanists were concerned to know what the Roman Law had been. The commentators were concerned with its present application in the Courts. Those pursued the *mos gallicus,* these the *mos italicus.* The victory lay with the latter; for to apply the classical law in the Courts was plainly impossible, let alone that lawyers had neither the time nor the inclination to qualify as professors of ancient history and literature. Roman Law was again exposed to

[29] *Europa und das Römische Recht.* By Paul Koschaker. (Biederstein Verlag München./Berlin. 1947.) Large octavo. Pp. x + 379. Price RM.12.50.

danger in the second half of the eighteenth century when the law of nature was a fashionable ideology, whose goal was a code based upon abstract principles of natural justice. Once again the law of the lawyers escaped the impending danger. This was due to the emergence of the so-called historical school, which under the influence of Savigny and his disciples dominated the scene during the nineteenth century. But the historical school—not to speak of its eccentric *volksgeist*—had limitations which have become apparent in retrospect. Its title to be called historical has been questioned. Certainly it selected history to suit its own doctrinal ends. It was not much interested (initially) in German Law. In the sphere of Roman Law it was definitely hostile to the work of the Commentators and the continuous tradition of past centuries. The " pandectists," men of renown, went back to the Corpus Juris to construct out of it a new *modernus usus*, which found its apotheosis and euthanasia in the *Bürgerliches Gesetzbuch*—particularly in the *allgemeiner Teil*, which has fallen into disfavour with recent codifiers.

Professor Koschaker has much to say about the Reception. He warns his German readers against supposing that the Almighty designed it for them alone, a blessing or the reverse as they choose to regard it (p. 142). It was a phenomenon widely diffused in time and space (p. 144). In Western Europe it was in full progress in the thirteenth and fourteenth centuries, in Germany not before the fifteenth. ' The Reception-Problem ' is " still far from a definitive solution " (p. 141). Professor Koschaker (if we do not misunderstand him) regards the Reception as natural and even inevitable. The Roman Law was the common law of Europe. It was authoritative. It was a legacy of the *imperium Romanum*. But this does not explain the German Reception in time and space. For this the author can only recommend an organized research into local receptions in *kleinen und kleinsten Gebieten*—a task, as he remarks, beyond the powers of any one man, and under present conditions impossible of realization. Anyway, the Reception is a *res acta* (p. 125). It has now a merely historical interest. There is no excuse for Romanists and Germanists to go on barking at one another like angry dogs.

Professor Koschaker devotes two chapters to *Juristenrecht*, a subject which has for him a particular attraction. *Juristenrecht* means lawyers' law. It is contrasted with *Professorenrecht*. Whether these are the Ormuzd and Ahriman of the legal world does not very clearly appear, for there seems to be a *tertium quid*, which is neither one nor the other. May we call it *neutrales Recht*? This conclusion we derive from the author's exposition of *Juristenrecht*. It implies a legal profession—organized, centralized—in friendly relations with a centralized political authority—and further (it would seem) an apprehension of or instinct for general principles—and (a more questionable proposition) a legal profession drawn from a particular social class. Obviously, such conditions are not everywhere present, nor always in any one system. Where they are absent *Professorenrecht* may prevail. But professors too are not omnipresent in time and terrestrial space, unless the term be understood to include priests and medicine men, and any persons in a tolerably organized society, *quibus permissum est jura condere* not directly as legislators.

" From what has been said " (writes Professor Koschaker (p. 196)) " the reader will have inferred that I rate *Juristenrecht* very highly—indeed regard it as the method of development best suited for the private law. In fact the three systems of law which have exercised the most durable and at the same time most extended influence in the history of law—the Roman Law, the Anglo-American, the French—are all systems of *Juristenrecht*, and the first two of these at least are characterized by an uninterrupted progression.

" *Professorenrecht* too has its special characteristics (p. 211). One in particular may be mentioned. *Juristenrecht* tends to centralization. Accordingly, the leading jurists, who are actively creative, are to be found in the centre of political authority in a State, since it is here that they most easily realize the conditions upon which the exercise of their functions depend. The Professor on the contrary works by argument. He is much less dependent upon State authority. He may live in a Province, and in fact often be more effective there than in the capital.

" This may be illustrated from the late Roman Law. The legal science of the late Empire in spite of its casuistic method, inherited from the classical jurists, is *Professorenrecht*. Theoretical problems take the first place. The leading jurists are professors. Legal instruction becomes more and more organized. We hear no more of famous jurists taking part in the administration of justice, influencing the course of legislation, giving opinions, etc. As a set-off against this, Law Schools emerge

not only in Rome and Constantinople (the second capital), but all over the Empire, while in the classical period the great jurists were only to be found in Rome. The primacy of the capital exists no longer. The most famous Law School of the Eastern Empire is situated not in Constantinople, but in a Syrian town—Berytus."

And again—" The term *Juristenrecht* [in contrast to its too extended use by Savigny] should be limited to law which is the creation of jurists, that is of practising lawyers. But it occurs that in certain times and under certain conditions the centre of gravity is shifted to the Law Schools, and law passes into the hands of professors. This is what I mean by *Professorenrecht*. I am far from regarding this description as free from objection; and it must be remarked that this does not mean that in such times and in such conditions professors alone make the law. *Juristenrecht* and *Professorenrecht* may exist side by side, and, similarly, teachers of law may have certain relations to its practice. But what is characteristic is that in the estimation of the time legal practice and legal practitioners fall into the background relatively to legal theory and legal theorists—the Professors. In this sense *Professorenrecht* is conveniently contrasted with *Juristenrecht*."

Compare with this (p. 249) the author's good-humoured, but rather devastating, description of the " theoretically orientated, rather unpractical, German professor with his strong dose of *doktrinarismus*."

The reviewer is well aware that in what is necessarily a brief abstract he may have failed to do full justice to Professor Koschaker's conception of *Juristenrecht*. If so he hopes that (to use a phrase current at the moment) the learned professor will not " take it amiss." Plainly, there is a great deal to be said about it which still remains unsaid. A mere antithesis of *Juristenrecht* and *Professorenrecht* seems an over-simplification. What one would wish to see is a comparative study of selected systems of law, modern and ancient, which would tell us exactly what happens or happened—the interplay of forces in each of them—of teachers of law, practising lawyers, the judiciary, and what we politely call the State, meaning thereby the persons who for the time being are in the saddle. Will not Professor Koschaker, for whom nothing is too difficult, make this the subject of his next book?

In his concluding chapters Professor Koschaker discusses the present state of Roman Law studies on the continent of Europe, and the consequent crisis of Roman Law. He observes how the new learning—the new humanism, as he calls it—has affected the teaching of Roman Law. From the time of the Glossators onwards the Corpus Juris had been authoritative just as the Bible was a book of authority for theologians. Nor did the historical school repudiate the idea. The crisis came at the end of the nineteenth century, when the hunt for interpolations coincided in Germany with the disappearance of the Roman Law from the Courts. The same problem had in a lesser degree presented itself in the sixteenth century. But then the *mos italicus* was firmly established in the Courts, and somehow or other the *mos gallicus* had to come to terms with it. Now the Roman Law as a living system was at its last gasp, and the new learning stood unchallenged. The consequence was soon seen in the changed attitude towards Roman Law in the Universities. Its history came to be emphasized along with, or to the exclusion of, the traditional exposition of the Institutes and the Pandects. But the history of Roman Law by an easy gradation leads on to the history of Greek Law, of Egyptian Law and, more remotely, of Babylonian and Assyrian Law, until it declines into one chapter in the history of ancient law or of comparative legal history. In Wenger's phrase ' Roman Law has lost its " splendid isolation ".' " This " (says Professor Koschaker (p. 342)) " is the crisis of Roman Law. For the first time in 800 years Roman Law has ceased to interest the lawyer." It has gone over to the historian, who for want of technical equipment may not be very well qualified to bear—if willing to accept—the burden put upon him.

For us in England too there is a crisis of Roman Law, but of a different character. It consists in the gulf which for the first time in history separates the expert teacher from the diligent student, to which must be added a general ignorance of the Latin language. A few students in our Universities may for some time to come listen with interest to what the lecturer has to tell them about interpolations, but few will be inclined or qualified to join him in research. Meanwhile an increasing number will be incapable of translating the Latin texts; and what is true of students today will be true of their teachers tomorrow. The University of London no longer requires students for the LL.B. to exhibit any knowledge of Latin either in the matriculation examination or at any subsequent stage, for, though the " History and Outlines of

Roman Private Law" is a prescribed subject for the Intermediate Examination in Laws, "No passages for translation from the Latin will be set, but Latin technical terms will be used."[30] Already it is beginning to be difficult to find persons qualified to teach Roman Law. So we may expect a day not far distant (if it is not already arrived) in which teachers with little Latin will impart Roman Law to students with less or none. This need not be immediately fatal to the teaching of Roman Law, for, after all, many people have got a great deal out of the New Testament without knowing Greek, and Roman Law may for a time continue, as before, to perform its useful functions of letting light into the dark places of the common-law mind and of conveying to students some elementary knowledge of the terms and institutions of foreign systems of law as well as of International Law. But with a general decline in all our cultural values this reprieve does not promise to be of long continuance.

It remains for the reviewer to express the pleasure he has had in reading this very noticeable book, a mine of erudite information, whose treasures he has partly and imperfectly indicated in these pages.

R. W. L.

INTERNATIONAL LAW

It is a pleasant task to welcome a treatise on International Law[31] with such a refreshingly new approach to the subject. This is a translation from a Danish original which, in the words of the author, is an analysis of the fundamental concepts of international law " on the basis of a specifically Scandinavian view of the nature of law and the aims of Jurisprudence to which there is probably nothing exactly similar in the Anglo-American literature." Thus we have here the cardinal doctrines of international law presented according to a scheme which is at once novel and stimulating to the English reader. It begins with a carefully argued analysis of the general concept of international law. There follows an exposition of the actual rules of law arranged under a typically continental fourfold scheme, beginning with the law of persons, then central rules of intercourse between states, then the " secondary " rules concerning breaches of the law and the conditions of responsibility, and finally the " tertiary " rules of procedure for settling and fixing responsibility. This insistence on a logical and schematic arrangement of the law has the advantage of giving a much clearer picture of the law as a whole, both its strength and its weakness, than can be had from the traditional empirical treatment of the standard English text. Especially valuable is the collection in chapter X of the rules and machinery for social co-ordination which have grown up during the last hundred years or so, such as the Universal Postal Union, and the like. These are vitally important; yet they tend to be so dispersed in the more orthodox textbook as almost to pass unnoticed.

The method of treatment is essentially jurisprudential. The author is concerned not with the details of the law but with meaning, significance, content and relevance of the fundamental concepts of the law. These are examined with ruthless logic from the point of view of a realist, sociological jurisprudence tempered by a robust common sense. The result is as admirable as it is instructive. The style of exposition too is in general beautifully lucid (although your reviewer must confess to having had difficulty at one point in forming in his mind a firm picture of a " socio-psychological empirical reality "). Professor Ross has more faith in the syllogism than in the precedent, and the reader trained in the common law method will miss the luxurious citation of precedent to which he is accustomed and will sometimes feel that he is journeying in a strange land without landmarks; but he will not complain for, as Professor Brierly says in his foreword, it is as well that we should become acquainted with another method of approach: " for lawyers of different countries to understand one another is to make their own small contribution to that feeling of international community upon which the very possibility of an effective international law depends."

Not all Professor Ross's conclusions will find easy acceptance. It is unfortunate

[30] In the LL.B. Examination Roman Law is one of twenty optional subjects, of which the candidate must select four. If he chooses Roman Law, he will be confronted with a paper including passages for translation and comment from a prescribed Title of the Digest.

[31] *A Text Book of International Law.* By Alf Ross, LL.D., Ph.D., Professor of International Law in the University of Copenhagen. (London: Longmans, Green & Co 1947.) Pp. 313. 21s.

perhaps that he is driven to adopt a definition of international law which seems to compel him to deny that individuals can be the subjects of international law duties (though he readily allows that they may have rights). This is difficult to reconcile with the Nuremberg Judgments (which are not mentioned) and moreover militates against a development which is both desirable and practicable. If so, as Holmes would have said, so much the worse for the definition. The Professor is nothing if not forthright, and he wins our admiration and affection by the unsophisticated condemnation of traditional views when he believes that they cannot stand in the light of reason. But he is occasionally perhaps a little too brusque in his dismissal of real difficulties. It is doubtful whether it is enough simply to say that the distinction between *de facto* and *de jure* recognition " has hardly any legal significance " (p. 120); or to deny categorically in one short sentence that there is no obligation to recognize a new state (p. 121); or impatiently to brush aside the Calvo Clause in two sentences (p. 265). However, these are all matters of opinion. The discussion as a whole is always stimulating, very often illuminating, and sometimes brilliant. The ruthless examination of notions of " sovereignty," for example, is altogether admirable.

It is a little unfortunate that it was not possible to incorporate more up-to-date material. In the next edition, which will surely be called for, we hope to see a discussion of the Nuremberg Judgments, and more especially the inclusion of a treatment in chapter XII of the machinery of the Charter of the United Nations for the settlement of disputes. The brief reference to air law (p. 226) should also mention the Chicago Convention of 1944; not the outmoded Paris Convention of 1919. Opportunity should also be taken to remedy the very large number of misprints.

R. Y. Jennings.

POLITICAL IDEOLOGIES

The twelve lectures included in this book[32] were given in their own language by a number of French scholars under the auspices of L'Ecole libre des Hautes Etudes de New York. They cover a wide field, from the theory of power in a primitive society, Kant and the French Revolution, the political doctrines of Mirabeau and Maurras, to the influence of the French republican tradition upon the resistance movement. As most of the authors had taken refuge in the United States during the war or before it, it is natural that, apart from Prof. Hamburger's lecture on La Doctrine politique du National-Socialisme, there should be many references to the theoretical basis of totalitarianism. Schmitt is probably justly regarded as immediately responsible for many of the more extravagant fancies of the Nazi theorists, but it is somewhat surprising to find Burke coupled with Luther as in the direct line of the authoritarian tradition. But though it is possible to find much to disagree with here and there, these essays may be said to have succeeded in their aim of " drawing attention to the problems most important for the understanding of modern political ideologies " and of " studying doctrine rather than presenting one particular doctrine."

J. W. J.

THE RED CROSS

This little pamphlet[33] by the President of the International Red Cross throws light on various interesting and generally unrealized problems which were encountered during the late war by the Red Cross and its associated or parallel organizations. Among them are, for instance, the difficulty of appropriating aid arising from the considerable inequality of contribution as between belligerents, and the highly delicate question as to whether a neutral body should of its own initiative raise public protest against violations of international law of which it, and perhaps it alone, has trustworthy information. One is struck by two things in particular in M. Huber's absorbing account: the fact that the International Red Cross had laid its precise plans for the War of 1939 already more than a year before it broke out; and the author's insistence that Swiss neutrality is a prime condition of his Committee's functioning in wartime. And one is left with the conviction that relief plans for a

[32] *Les Doctrines Politiques Modernes.* Introduction par. B. Mirkine-Guetzevitch. (Brentano's: New York and Paris, 1947.) Pp. 322. $2.50.

[33] *Principles and Foundations of the Work of the International Committee of the Red Cross* (1939-1946). By Max Huber. (Geneva. 1947. International Committee of the Red Cross.) Pp. 41.

possible war in which Switzerland is a belligerent—or in which there are no neutrals at all—must exist, and with a certain curiosity as to what they are.

CLIVE PARRY.

THE GROWTH OF LAW

THIS lecture[34] emphasizes the great services to legal development of a great European movement, the pursuit of Natural Law. At a time when statesmen and others are searching for unifying factors in Western civilization, it is important to know that for a hundred and fifty years, from 1660 to 1815, the most powerful influences in the growth of law were cosmopolitan in scope, and that the great natural lawyers themselves were in the habit of moving from one country to another. The author lists some of the effects on private law of this great movement, so little known in this country, and very properly insists on the variations of method and temperament among the natural lawyers, a generation of systematizers like Pufendorf and Domat, concerned above all to find rational justifications of the existing order, being followed by analysts of critical temper such as the German Thomasius and the French Encyclopédistes, and they in turn by the synthetists, who reaped the harvest in the great codifications in Prussia, France and Austria. Like so many foreign writers, he is somewhat at sea when he deals with England, paying too much attention to the writings of publicists and failing to recognize the abnormal slowness and uncertainty of their influence on professional opinion.

F. H. L.

Revista de la Escuela Nacional de Jurisprudencia. Universidad Autonoma de Mexico. Tomo IX Nums. 35 y 36. July–December, 1947, Mexico, D.F. Pp. 457.

This issue of this valuable periodical is proof of the high level not only of legal science, but also of legal teaching in Mexico. It opens with a reprint of a number of lectures delivered during a Course on the Interpretation of Statutes given in the Law School during the winter term, 1946. Professor Garcia Maynez, having defended the theory of " objective interpretation " which interprets the statute in accordance with its systematic meaning and not in accordance with the intention of the legislator, the ball is taken up by Professor Valdes Villarreal who describes modern objectivist tendencies in interpretation. Professor Laborde convincingly defends—against Kelsen and Carlos Cossio—the conception of " gaps in the statute " and points out that Kelsen's attempt to eliminate this conception by the rule that " what is not prohibited, is permitted " is due to an exaggeration of the importance of a self-evident principle. Professor Dominguez continues the story by explaining the methods of integrating the " gaps " into the system of the law. Finally Dean Esteva Ruiz in a study of considerable interest to comparative lawyers deals in detail with the attitude of Mexican law to questions of interpretation. Statutory rules, the opinions of authors and—last not least—significant quotations from decisions of the Supreme Court are systematically arranged in a manner which renders it easy to ascertain quickly the attitude of Mexican law to the various problems of interpretation. Professor Tena Ramirez' study on the " crisis of the division of powers " shows the great interest which constitutional developments in this country find in South America. According to Professor Tena Ramirez " the future of freedom in the modern world depends upon the success of the Labour experiment in England." The learned author considers this experiment as the decisive test of a liberal tradition which in the past has won every battle. " If it triumphs on this occasion, the example will not be lost upon other nations. It is this tradition which has made of the English nation the master of the public law." Dr. Bruera's interesting study on the development of law from the personalistic tendencies of early times to modern rationalism and beyond, a very detailed review from the pen of Professor Jimenez Huerta of a work on general conceptions of criminal law by Professor Jimenez de Asua, the study by Dr. Menendez, a Cuban judge, on the problems with which a judge in criminal matters is faced, and last not least Professor Ramirez' attractively written summary of the History of Mercantile Law in Honduras, which includes a summary of the 1946 draft Code of that country, may be taken as examples of the rich and varied fare contained in this volume. Among the reviews attention should be directed to a severely critical study of the Nuremberg trial which has been published by a Mexican author, Franco

[34] *Das Naturrecht und die europäische Privatrechtsgeschichte:* by Hans Thieme, Professor an der Universität Göttingen. (Basle: Helbing & Lichtenhahn.) Pp. 54.

Sodi. The latter comes to the conclusion that the Nuremberg trial " will not satisfy international conscience and above all will be quite ineffective in preventing in the future those crimes which it has tried to punish." The reviewer, Professor Alacala-Zamora y Castillo, goes even further. According to him the Preamble of the London Charter and the Charter of the International Military Tribunal constitute " the two most lamentable documents which international law has ever produced." There is certainly plenty of room for criticism of the methods and results of the Nuremberg trials. But an unbiased investigation will not be assisted by exaggerations of this type.

E. J. Cohn.

THE LAW SOCIETY'S CONFERENCE

This record[35] is well worth keeping by one for reference, the more so as it deals with practical matters which are imperfectly presented in the ordinary books. On most points a French and an English paper are printed followed by a report of the appropriate committee, the latter sometimes in French, sometimes in English. Generally speaking, the record is informative and accurate; but there was, it would seem, a perhaps unavoidable tendency for the two papers on a particular topic to have little relevance to each other; and one of the dangers of comparative study is shown in the remark on p. 138: " *Très rarement,* en Angleterre, le jugement est motivé. Le Juge rend sa sentence, sans avoir à exposer les motifs de sa décision." This is certainly true in the sense that justices of the peace do not give reasons for their decisions; further, the actual judgment or order even of a superior Court does not contain any statement of the legal grounds for it. But, as Professor David has pointed out, a judge of a superior Court invariably takes the opportunity of delivering what is, in effect, a lecture on the particular point of law. Thus the difference becomes merely one of form and not of substance, at least so far as the superior Courts are concerned.

F. H. L.

The following publications have also been received:—[36]

Arbitration Journal. Vol. 2, No. 3. (American Arbitration Association.)

Ball, Sir William. *Lincoln's Inn.* (London: Stevens & Sons, 1947.) Pp. viii, 285.

Boletim do Ministerio da Justica. A new series, which started in July, 1947, should give to those who have no access to the official Portuguese documents a very clear, indeed the best possible, idea of what is happening to the law of Portugal. Each number contains not only articles of interest, but also a digest of important decided cases and an abstract of the legislation of the period covered by it.

Briggs, Professor H. W. *The Progressive Development of International Law.* (Turkish Institute of International Affairs, 1947.) Pp. 46.

Bulletin Trimestrial de la Societé de Legislation Comparée.

It is pleasant to note the reappearance of this Bulletin. After a double number covering January–June, 1947, numbers have appeared regularly every quarter. The policy of our distinguished contemporary seems to be to devote numbers, in the main, to the laws of particular countries, or groups of countries, and topics of Swiss, South American and Hungarian have been covered in succession.

' Current Law ' Statutes, 1948. Parts 1 & 2. (London: Stevens & Sons.)

Declava, Matteo. *Sul Problema Del Rinvio Nel Diritto Internazionale Privato.* (Università di Trieste, 1942.) Pp. 10. 5 lire.

Diamond, William. *Czechoslovakia Between East and West.* (London: Stevens & Sons, 1947.) Pp. xii, 258. 12s. 6d.

Directions for Noting the Amendments made by Acts passed in 1946 *to the Revised Statutes to* 1920 *and the Annual Volumes since that date.* (1947.) Pp. 110. 5s. *Amendments made by Acts passed in* 1947. Pp. 206. 5s. (London: H.M. Stationery Office, 1948.)

Domke, M. *Settlement-of-Disputes Provisions in Axis Satellite Peace Treaties.* (Reprint from American Journal of International Law. Vol. 41, No. 4.)

Domke, Martin. *The Control of Alien Property.* Supplement to Trading With the Enemy in World War II. (N.Y.: Central Book Co., 1947.) Pp. viii, 334. $7.50.

[35] *A Comparison of English and French Law and Legal Procedure,* being a series of papers discussed at the Anglo-French Legal Conference held in London, June, 1947. (London: The Law Society.) Pp. 207.

[36] Mention here does not preclude review later.

Four years having elapsed since the author published his *Trading With the Enemy in World War II,* he has now published a very useful supplement which greatly increases the value of the earlier volume. I am sure that there are many practising lawyers on both sides of the Atlantic who will welcome this publication.

A. D. McN.

Dudan, Bruno. *Sulle ' Arbitrarie ' nei territori di Cattaro.* (Università di Trieste, 1942.) Pp. 33. 8 lire.

Dymond, Robert. *The Death Duties.* (London: Solicitors Law Stationery Society, 1948.) Pp. 44. 3s. 6d.

El-Gritly, A. A. I. *The Structure of Modern Industry in Egypt.* (Cairo: Imprimerie Nationale, 1948.) Pp. 363–582. PT 40.

Everyman's Own Lawyer. (London: Technical Press, Ltd., 1948.) Pp. xvi, 894. 25s.

It is eighty-five years since the first edition of this book was published with the definite intention of providing a work which would enable the layman to dispense with professional assistance and advice. The fact that 66 editions have been required suggests that it has been successful, though it may be doubted whether the circulation is by any means confined to laymen. In the course of time, it has become a handy reference book for the practising lawyer, especially as it adopts the usual method in law books of referring to decided cases. The legislation of the three years since the publication of the previous edition has necessitated considerable alterations, and the changes which are constantly taking place make it difficult to keep the book up to date. An example is provided by a new chapter which has been added on War Disability Pensions, but as a whole, the book certainly serves a useful purpose.

Ewen, C. L'Estrange. *Seances and Statutes.* (Paignton, C. L. Ewen, Jan., 1948.) Pp. 17. 1s. 6d.

FitzGerald, S. Vesey. *The Future of Oriental Legal Studies.* (London: Lewis & Co., 1948.) Pp. ii, 20. 2s. 6d.

Gazdar, John. *National Insurance.* (London: Stevens & Sons, 1947.) Pp. ix, 74. 3s.

German Major War Criminals, Trial. Part 14, 14th May, 1946, to 24th May, 1946. Pp. ix, 408. 7s. Part 15, 27th May, 1946, to 6th June, 1946. Pp. ix, 422. 7s. Part 16, 7th June, 1946, to 19th June, 1946. Pp. x, 395. 6s. 6d. (London: H.M. Stationery Office, 1948.)

Goldschmidt, Werner. *Sistema Y Filosofia del Derecho Internacional Privado.* Tomo 1. (Barcelona: Bosch, Casa Editorial, 1948.) Pp. 311. 50 ptas.

Graveson, R. H. *The Conflict of Laws.* (London: Sweet & Maxwell, 1948.) Pp. xxxii, 394. 30s.

Ilbert, Sir Courtenay. Parliament. Third Edition, edited by Sir Cecil Carr. (Oxford University Press, 1948. Geoffrey Cumberelege.) Pp. ix, 229. 5s.

Sir Cecil Carr has completely revised a new edition of Sir Courtenay Ilbert's admirable little volume on " Parliament, Its History, Constitution and Practice," in the Home University Library. Since the publication of the second edition in 1920, of which there have been nine reprints, the Irish Constitutional changes, and the Statute of Westminster have involved considerable changes. There has also been the extension of departmental law-making which has necessitated the division of the chapter formerly covering Finance and Administration. In a graceful tribute to Sir Courtenay Ilbert, the Editor assures his readers that the book remains in substance as it was first written. For nearly forty years the book has been a standard text book, and the name of Sir Cecil Carr as Editor is sufficient to maintain its reputation.

India, General Statutory Rules and Orders (1943–45). (Delhi: Government of India Press, 1948.) Pp. iii, 546. 16s. 6d.

Indian Historical Records Commission, Proceedings of Meetings. Vol. XXIII. 23rd Meeting held at Indore, December, 1946. (Delhi: Government of India Press, 1947.) Pp. ii, 163, 73, 47.

Instituto de Derecho Comparado, Universidad Nacional Autonoma de Mexico. Ensayo Bibliografico de Derecho Constitucional Mexicano y de Garantias y Amparo. (Mexico: Imprento Universitaria, 1947.)

This bibliography of the Mexican literature on Constitutional law and basic human rights will undoubtedly prove to be a boon to students of comparative law in both these fields, provided of course they are in the fortunate position of having access to

the sources listed here. The amount of thought that has been given in Mexico to questions of constitutional law and the theory of state, which latter topic is fortunately included in the purview of the bibliography, is certainly impressive. No less than 1,851 works are listed here, many of which are of considerable size. When is English law going to be provided with a similarly comprehensive bibliography which might give access to many treasures now hidden away and unused in the dark corners of the Law Libraries or of the British Museum?

Inter Arma Caritas. (The Work of the International Committee of the Red Cross during the Second World War.) (Geneva: International Committee of the Red Cross, 1947.) Pp. 135.

International Court of Justice, Year Book, 1946–1947. (The Hague: International Court of Justice.) Pp. 233.

Iraq, The Kingdom of. By a Committee of Officials. (U.S.A.: Lord Baltimore Press, 1946.) Pp. x, 118.

Jenner, Antonio. *La Puissance protectrice en Droit International.* (Basle: Helbing & Lichtenhahn, 1948.) Pp. 79.

Kellor, Frances. *American Arbitration.* (N.Y.: Harper & Bros., 1948.) Pp. xiii, 262. $3.00.

Law Reports of Trials of War Criminals. Vol. II. Pp. xii, 156. 3s. Vol. III. Pp. xi, 123. 5s. Vol. IV. Pp. ix, 130. 5s. (London: H.M. Stationery Office, 1948.)

Les Problemes de la Sauvegarde de la Paix et de la Liquidation des Suites de Guerre au Point de Vue du Droit Polonais. (Brussels: Service Polonais pour la recherche des criminels de guerre, 1947.) Pp. 128.

Meek, C. K. *Colonial Law.* (Oxford University Press: Geoffrey Cumberlege, 1948.) Pp. xiii, 58. 4s. 6d.

The indigenous systems of law and land tenure are of considerable importance in all parts of the Colonial Empire. Study of the subject for which there is a real need is greatly aided by this bibliography prepared by Dr. Meek. It is the fifth of a series produced under the auspices of the Nuffield College originally for the use of students and as the product of his learning and ability providing material for Colonial Administrators. It is specially devoted to the African systems though it also includes material on legal theory and history, sociological jurisprudence and the development of the legal systems of India and Ceylon under British rule. It is also supplemented by some South African data. Guidance is provided for the reader by the indication of the importance of the works comprised in the list. The index of authors complements the functional and territorial arrangement.

Mello, Rubens Ferreira de. *Tratado de Direito Diplomatico,* Vol. 1. Pp. 458. Vol. II. Pp. 351. (Brazil: Ministry of Foreign Affairs.)

Moore, John Bassett. *Commencement Address and Bibliography.* (Yale University Press, 1944.) Pp. 50.

Morgan, J. H. *The Great Assize.* (London: John Murray, 1948.) Pp. vii, 44. 2s.

Moser, Rudolf. *Das europaische Ehescheidungs—und Ehetrennungs-Recht in seiner neuesten Entwicklung.* (Zurich: Schulthess & Co., 1948.) Pp. iv, 55.

Nigeria, Legislative Council Debates. First Session, 28th, 29th August and 1st September, 1947. (Lagos: Government Printer.) Pp. 118. 1s. 6d.

Panstiwo i Prawo. Rok III. Marsec, 1948. Zeszy 3 (25). (Lodz.) Pp. 190.

Parliamentary Affairs. (London: Hansard Society.) Pp. 100. 4s.

Polish Regained Territories, One Legal Aspect. (Warsaw: Polish Main National War Crimes Investigation Office, 1948.) Pp. 29.

Prisoners of War, June, 1948. (Washington: Institute of World Polity.) Pp. v, 98. $1.50.

Rapport sur la Conference de Prague de L'International Law Association. (Société Egyptienne de Droit International, Janvier, 1948.) Pp. 36.

Revista Juridica de la Universidad de Puerto Rico. Marzo–Abril, 1947. Volumen XVI. Numero 4.

This issue of the excellent Puerto Rico University Law Journal contains an article of considerable interest to constitutional lawyers from the pen of Professor Toledo Alamon. By a law of 1904 the writ of certiorari was introduced into the Puerto Rico Code of Civil Procedure (now s. 670). Professor Alamon discusses the interpretation of this rule by the Puerto Rican courts, which have obviously found plenty of opportunity for applying it. His study, written with admirably clearness, gives a most interesting description of the development of one of the fundamental rules of

English common law in a system in which common and civil law characteristics have been amalgamated. Those who believe that Lévy-Ullmann was right when he predicted that the semi-civilian laws are forerunners of the shape of the probable result of an international unification of law, will find a great deal of unusually interesting material in modern Puerto Rican law.

Ross, Alf. *Towards a Realistic Jurisprudence.* (Copenhagen: Einar Munksgaard, 1946.) Pp. 304. Dan. cr. 18.

Ruegg, E. *Niederlassungsfreiheit und Beschränkung der Freizügigkeit.* (Zurich: Schulthess & Co., 1948.) Pp. xi, 170.

Sack, Alexander N. *The Truman Doctrine in International Law.* (Reprint from Lawyers Guild Review, Vol. VII, No. 4, July–August, 1947.) Pp. 141–178.

Sheldon, Dr. J. H. *The Social Medicine of Old Age.* (Oxford University Press: Geoffrey Cumberlege, for Nuffield Foundation, 1948.) Pp. x, 239. 5s.

South Australian Industrial Reports. Volume XX, 1946. (Adelaide: Government Printer, 1947.) Pp. vi, 237.

State Law Index, 1945 to 1946. 11th Biennial Volume. (Washington: Library of Congress, 1948.) Pp. vii, 729. $2.50.

Statutory Criminal Law of Germany. Edited by Eldon R. James. (Washington: Library of Congress, 1947.) Pp. xx, 276.

The Library of Congress provides an English version of the German Criminal Code of 1871 with its subsequent amendments and the most important supplementary penal statutes. The work, which was prepared by Vladimir Gsovski, Ph.D., Chief of the Foreign Law Section, and edited by Eldon R. James, then Law Librarian, for the use of personnel in the American Zone of Germany, should also prove of great value to students of comparative criminal law, for the translation is accurate, the greatest care has been taken to follow all the changes in the law, including those of the Nazi period and those introduced by the Control Council for Germany, and the text is accompanied by brief but useful notes. Especially valuable for general purposes is the English-German and German-English Index and Glossary.

F. H. L.

Sudan Laws. Volumes 1, 2, 3 and 4. Consolidated. (Sudan Government.)

Vaze, S. G. *Fundamental Rights in the Draft Constitution of India.* (Poona: J. R. Gharpure.) Pp. 17. 8 annas.

Zepos, P. J. *Frustration of Contract in Comparative Law and in the new Greek Civil Code of* 1946. (Reprint from Modern Law Review, January, 1948.) Pp. 33–46.

The following periodicals have also been received: American Bar Association Journal; American Journal of International Law; American Political Science Review; Arquivo de Direito Militar; Australian Law Journal; Bombay Law Reporter; Bulletin de Droit Tchécoslovaque; Bulletin of the International Civil Aviation Organisation; Bulletin Trimestriel de la Société de Législation Comparée; Calcutta Weekly Notes; Canadian Bar Review; Columbia Law Review; Eugenics Review; Food and Agriculture; Hindustan Review; Indian Law Review; International Law Quarterly; International Law Review; Journal de Jurisprudence Hellénique et Étrangère; Journal of the Parliaments of the Empire; Journal of the Society of Clerks-at-the-Table in Empire Parliaments; Juridical Review; L'Egypte Contemporaine; Madras Law Journal; Medico-Legal Journal; Modern Law Review; N.A.C.C.A.; Rassegna di Diritto Pubblico; Revista de la Escuela Nacional de Jurisprudencia; Revista Juridica de la Universidad de Puerto Rico; Revue International de la Croix Rouge; Revue de Science Criminelle et de Droit Penal Comparé; South African Law Journal; Toronto University Law Review; Tulane Law Review; Unesco Bulletin for Libraries.

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